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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

HANNA BOYS CENTER,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and

SOCIAL SERVICES UNION LOCAL 535, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Real Party In Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

The National Labor Relations Board asserted jurisdiction over Hanna Boys Center and ordered Hanna to bargain with a union over the terms of employment of Hanna's nonteaching employees. The Ninth Circuit Court of Appeals enforced the Board's order.

Hanna is a year-round, residential school operated by the Roman Catholic Diocese of Santa Rosa, California. Its nonteaching employees, particularly its child care workers, act as surrogate parents to the students and fulfill a critical role in Hanna's religious mission. Accordingly, the Board's assertion of jurisdiction, and the Board's conduct, give rise to the following issues:

1. Whether, pursuant to *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504-05 (1979), the Board exceeds its authority under the National Labor Relations Act by asserting jurisdiction over a church-operated school and its nonteaching employees.

2. Whether the Board's assertion of jurisdiction over a church-operated school and its nonteaching employees violates the guarantees of the Religion Clauses of the First Amendment.

3. Whether the Board violates the Administrative Procedure Act or proceeds in excess of its jurisdiction by enforcing an election certification issued after the Board's unreasonable delay of more than six years.

4. Whether the Board must review its jurisdiction at any time the issue is raised and may not rely on stale evidence to assert jurisdiction.

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Petitioner Hanna Boys Center[1/] prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeals for the Ninth Circuit rendered in these proceedings on October 30, 1991.

OPINIONS BELOW

The October 30, 1991 opinion of the Court of Appeals for the Ninth Circuit is appended as Appendix A. The March 25, 1989 opinion and bargaining order of the National Labor Relations Board reviewed by the court is reported at 293 N.L.R.B. 359 and appended as Appendix B. The July 17, 1987 opinion of the Board concerning its jurisdiction over Hanna is reported at 284 N.L.R.B. 1080 and appended as Appendix C.

JURISDICTION

The original opinion of the Ninth Circuit was issued on August 7, 1991. Ten copies of this opinion have been lodged with the Court's Clerk. Hanna requested rehearing. The Ninth Circuit issued an amended opinion and order denying rehearing on October 30, 1991. On January 11, 1992, an order was issued by Sandra D. O'Connor, Associate

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1/ As Hanna Boys Center is a residential school operated by the Roman Catholic Diocese of Santa Rosa, California, the Bishop of the Diocese of Santa Rosa, a California Corporation Sole, also has an interest in this case.

Justice of this Court, extending the time to file a petition for a writ of certiorari to February 27, 1992.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The court below was called upon to interpret the Free Exercise and Establishment Clauses of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The relevant provision of the Administrative Procedure Act, 5 U.S.C. § 555(b), states: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."

The definitions of "employer" and "employee" in the National Labor Relations Act, 29 U.S.C. § 152(2) and (3), are also involved in this case and are set forth in Appendix G.

STATEMENT OF THE CASE

I. Facts Relevant To The Issues Presented.[2/]

A. Hanna Boys Center Is A Catholic School Under The Control And Supervision Of The Diocese Of Santa Rosa.

In 1945, Monsignors William L. O'Connor and William J. Flanagan, both working with Catholic charitable organizations for the Archdiocese of San Francisco, created a school for troubled boys (Tr. 9-10). The school first was operated in a large home owned by the Archdiocese of San Francisco (Tr. 10). The priests who founded Hanna, the Archdiocese of San Francisco and the Archdiocesan school system all were involved in designing Hanna's curriculum (Tr. 66, 74).

The following year, the school was incorporated as "The Archbishop Hanna Center for Boys" (Tr. Pet. Exh. 2). The Articles of Incorporation specify that Hanna's purpose is "to provide a home and mental, moral, educational, physical and spiritual training for minor boys who, because of broken homes, or for any other cause, are in danger of becoming delinquents" (Tr. Pet. Exh. 2.)

In 1950, Hanna moved to Sonoma, California (Tr. 14-15). The Archbishop of San Francisco purchased the

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2/ Pursuant to the Ninth Circuit's ruling, this section sets forth facts current only as of the Board's representation hearings in 1980. Citations to the transcript and exhibits of the 1980 hearings are denoted as "Tr."

property (Tr. 15). The buildings and facilities were financed by assessments levied on all the Catholic parishes within the Archdiocese of San Francisco (Tr. 15). In 1962, the Archdiocese split into several dioceses, and Hanna came under the jurisdiction of the Diocese of Santa Rosa (Tr. 13). The Bishop of Santa Rosa has been the President of Hanna's Board of Directors; his Vicar-General, the Bishop's "right-hand man," has been the Senior Vice-President of the Board (Tr. 13-14). Hanna's Executive Director, who is responsible for the general direction and control of Hanna, and the Associate Director are priests. Although the Executive Director and the Associate Director are Hanna's top administrators, their salaries are paid by the Bishop of Santa Rosa (Tr. 131).

Hanna maintains a core of Roman Catholic staff. Sisters of the Order of Saint Francis of Assisi of Milwaukee, Wisconsin, help staff Hanna (Tr. 23). Like the two priests, the sisters are paid directly by the Bishop of Santa Rosa (Tr. 55). Nuns constitute roughly 30 percent or 40 percent of the teaching staff (Tr. 76-77). The school psychologist is also a nun, as is the school receptionist and the school nurse (Tr. 23-24). The priests and nuns live on the same campus as the students (Tr. 39). A priest is on duty at all times on campus (Tr. 39).

Hanna Boys Center operates as part of the Diocese of Santa Rosa's school system (Tr. 75). The Diocesan Superintendent of Schools reviews the programs taught at Hanna to see that they meet Diocesan standards (Tr. 168). Hanna makes reports to the Diocese (Tr. 95). Hanna enjoys

a religious exemption from federal income taxes (Tr. 41). The determination letter from the Internal Revenue Service confirming this exemption states the basis on which it was granted:

> Examination . . . discloses you are under the control and supervision of the Santa Rosa Diocese of California. Your organization is listed on page 855 of the Official 1978 Catholic Directory. Your exempt status was confirmed in a Group Ruling Letter dated April 30, 1974, to the United States Catholic Conference. . . . [T]he Code exempts churches, agencies and institutions of such churches from filing annual information returns. Therefore, as an institution under the supervision and control of the Roman Catholic Church, you will not be required to file annual information return. . . .

(Tr. Emp. Exh. 1.)

B. Hanna's Religious Mission Pervades Its Total Day-To-Day Operations.

Hanna provides a structured, 24-hour-a-day Christian-Catholic environment (Tr. 19). The students are taught academic material, social skills and moral values (Tr. 19). All students are required to attend mass on Sundays and Holy Days of Obligation (Tr. 104). Hanna's chapel,

located in the middle of its campus, forms the hub of the campus (Tr. 35).

At virtually all times of the day, the students are in the presence of some of Hanna's staff (Tr. 177). On a typical day, students rise at approximately 6:30 a.m. and are brought to the chapel by the child care workers for morning prayers (Tr. 32, 34-35). The cottage group then goes to the dining area for breakfast (Tr. 32). The child care workers see that the boys say grace before and after meals (Tr. 35, 104).

At approximately 8:50 a.m., classes begin (Tr. 32). The children say additional prayers before classroom instruction actually begins (Tr. 35). Classroom instruction continues until 3:10 p.m. The children say prayers at the end of the school day (Tr. 104). The rest of the afternoon is spent in various ways, including appointments with a student's therapist or perhaps recreation (Tr. 32).

The students return to the dining area for dinner at 5:30 p.m. (Tr. 33). Before and after dinner, the child care workers are responsible for seeing that the students say grace (Tr. 35, 104). After dinner, some boys take physical education classes, while others stay in the cottage areas (Tr. 33). Later, back in the cottages, the child care workers supervise the study period during which the children do their homework, including regularly scheduled homework from the daily religion class (Tr. 33-34, 38). The child care worker in each cottage selects one student to lead the group in evening prayers (Tr. 36).

Mandatory classroom education is provided at Hanna year around. Hanna provides courses in mathematics,

language arts, social studies, civics and science (Tr. 147). Physical education classes are taken in the evening (Tr. 147-148). Hanna also provides mandatory instruction in religion (Tr. 147, 152-153). The religious instruction attempts to instill ethical and moral norms and religious beliefs (Tr. 76, 152). The religion class exposes the students to comparisons with the views of other religions, but the Catholic point of view is heavily stressed (Tr. 181). Homework is assigned for the religion classes and the child care workers are required to supervise the students' completion of that homework (Tr. 33-34, 38).

All of Hanna's employees are expected to "act in a way that's compatible with Christian -- Catholic standards" (Tr. 22). Hanna's employees are expected to act as exemplars so that the students can learn from them (Tr. 31). Child care workers play a particularly crucial role in the boys' religious services each day. The child care workers are responsible for bringing the children to the chapel for morning prayers during the week and for Sunday mass. Child care workers are responsible for supervising grace before and after meals and seeing that the boys' homework for religion classes is completed. Failure to discharge any of these obligations is grounds for discharge (Tr. 103-104).

Hanna's Executive Director, a Catholic priest, has ultimate authority to hire, fire, promote or adjust grievances for all employees of the Center (Tr. 100). In the absence of the Executive Director, the Associate Director, also a priest, is in charge of labor relations at Hanna Boys' Center (Tr. 99-100).

C. The Board Has Asserted Jurisdiction Over Hanna.

On September 24, 1980, Social Services Union, Local 535 petitioned for an election to determine whether the following employees of Hanna Boys Center wished to be represented by that union:

> Child care workers, recreation assistants, cooks, cooks' helpers, caseworkers, plumbers, electricians, gardeners and custodians.

Hanna protested that the Board's assertion of jurisdiction was barred by the ruling in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and by the First Amendment. A three-day hearing was held in late 1980 to determine the Board's jurisdiction. The election was held on March 18, 1981, but all ballots were impounded while the Board decided its jurisdiction.

Six years and four months later the Board issued its decision (Appendix C). The Board ruled that because the proposed bargaining unit did not include teachers, *Catholic Bishop* did not apply and it was free to assert jurisdiction.

On February 29, 1988, the ballots from the 1981 election were opened and counted. Twenty votes were cast in favor of representation by Local 535 and 14 votes were cast in opposition to such representation.

After Hanna refused to bargain in order to preserve its right to judicial review, Local 535 filed an unfair labor practice charge. A complaint was issued on Local 535's

unfair labor practice charge and the Board issued an order directing Hanna to bargain with Local 535 over the terms and conditions of employment of Hanna's nonteaching employees (Appendix B).

Throughout the Board's proceedings, Hanna continually submitted evidence to the Board concerning events which had occurred during the Board's six-year delay, including changes in Hanna's corporate status, Bylaws, and Mission Statement, the duties of its employees, as well as evidence concerning the prejudicial effect of the Board's extraordinary delay. The Board repeatedly rejected Hanna's evidence (Appendix B, D, E and F).

In its amended opinion of October 30, 1991, the Ninth Circuit enforced the Board's bargaining order (Appendix A).

II. Jurisdiction In The Court Below.

The court below had jurisdiction over the Board's application for enforcement of its bargaining order pursuant to section 10(e) of the NLRA. 29 U.S.C. § 160(e).

REASONS FOR GRANTING THE WRIT

I. Introduction.

The court below interpreted *Catholic Bishop* as ruling that only the teachers of a church-operated school are outside the jurisdiction of the NLRA. Review should be granted to

determine NLRA jurisdiction for three reasons. First, the Ninth Circuit's decision conflicts with the Second Circuit, which has held that the jurisdictional restrictions set forth in *Catholic Bishop* are not limited only to teachers but apply generally to church-operated schools. A writ of certiorari should be granted in this case in order to resolve this conflict between the Ninth and Second Circuit Courts of Appeals. Second, either the Second Circuit or the Ninth Circuit has decided a federal question in a way which conflicts with this Court's ruling in *Catholic Bishop*. A writ of certiorari should be granted to clarify which court has applied *Catholic Bishop* correctly. Third, should this Court determine that *Catholic Bishop* applies only to teachers, it must be decided whether the Board's jurisdiction extends to a church-operated school and its nonteaching employees. A writ of certiorari must be granted to decide this important question of federal law.

If the ruling in *Catholic Bishop* is limited only to teachers and the NLRA is applied to church-operated schools, this Court is faced with another important question of federal law left open by *Catholic Bishop*: whether the Board's assertion of jurisdiction over a church-operated school and its nonteaching employees violates the guarantees of the Religion Clauses. In *Catholic Bishop*, this Court discussed the critical and unique religious mission of church-operated schools which teach Catholic values during normal school hours. The teaching employees of these schools were in contact with children for only a portion of the day. The children returned home to parents where the teaching of Catholic values continued.

However, at Hanna, the students do not return home at 3:00 p.m. All of Hanna's employees act as teachers and surrogate parents and are charged with the responsibility of instilling the boys with the Catholic values they cannot learn in their own homes. Religious authority does not pervade merely the teaching of reading, writing and arithmetic at Hanna. Religious authority pervades every aspect of Hanna's operation, because education in Catholic values continues 24 hours a day. If the unique role of a 9:00 a.m. to 3:00 p.m. school and its teachers is acknowledged, it cannot be doubted that individuals serving in the role of surrogate parents 24 hours a day also fulfill a critical and unique role in the religious mission of a church-operated residential school. The suffusion of religion into every activity of Hanna and the mandate to every employee to act as an exemplar of Catholic values for Hanna's students creates the risk that assertion of Board jurisdiction will infringe upon Hanna's First Amendment rights.

The issue of NLRA jurisdiction over church-operated schools and their lay employees, and the issue of whether such jurisdiction violates the First Amendment were deemed by the Court in *Catholic Bishop* to be worthy of review. These issues are still worthy for review now that the Board is, as a result of the Ninth Circuit's decision, about to assert jurisdiction over all nonteaching employees of church-operated schools. There are vast numbers of religious schools in the land with thousands of employees who will be affected by this action. They have a need for a decision determining their rights under the *Catholic Bishop* rationale and under the Religion Clauses.

The remaining issues presented for review concern the Board's over six-year delay in ruling on its own jurisdiction. A writ of certiorari is appropriate because the Board's delay departed so far from the usual course of administrative/judicial procedures as to call for the exercise of this Court's power of supervision. A writ of certiorari also should be granted because the Ninth Circuit's enforcement of a bargaining order after the Board's unreasonable delay conflicts with the stated position of the Seventh and Second Circuits and raises important federal questions concerning jurisdiction and administrative process.

II. By Asserting Jurisdiction Over Hanna Boys Center, The Board Exceeded Its Authority Under The NLRA.

A. This Court Must Resolve A Conflict Between The Ninth And Second Circuits Concerning The Board's Jurisdiction Over Church-Operated Schools.

In this case, the Ninth Circuit ruled that *Catholic Bishop* applies only to teachers in church-operated schools and that the Board has jurisdiction over church-operated schools and its nonteaching employees. The Ninth Circuit's interpretation of *Catholic Bishop* is in direct conflict with *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (2d Cir. 1987), *cert. denied*, 484 U.S. 830 (1987). In that case, it was argued that *Catholic Bishop* applied only to

teachers in church-operated schools. However, the Second Circuit Court of Appeals ruled:

> We reject appellant's argument that *Catholic Bishop of Chicago* applies only to *teachers* at church-operated schools and that the *schools* themselves are subject to NLRB jurisdiction. . . . [T]he NLRB does not have jurisdiction over church-operated schools.

Id. at 222 (emphasis in original). Hanna's petition for a writ of certiorari must be granted to resolve the conflict between the Ninth and Second Circuits.

B. Review Is Necessary Because The Ninth Circuit's Decision Conflicts With This Court's Ruling In *Catholic Bishop*

In *Catholic Bishop*, a union sought to represent teachers in Chicago's parochial high schools. The Catholic Bishop of Chicago argued that the schools did not fall within the Board's statutory jurisdiction and that the First Amendment precluded the Board from asserting jurisdiction. This Court detailed the constitutional dangers inherent in the Board's assertion of jurisdiction over a school with a religious mission and stated that it would be required to resolve these constitutional questions if it were to conclude that the Board's jurisdiction extends to church-operated schools. The first issue addressed by this Court, therefore, was the jurisdictional limitations of the NLRA.

The Court's reasoning on jurisdiction centered on the definition of "employer" within the NLRA. *Id.* at 504-507. The Court first reviewed the enactment of the NLRA and found that:

> Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools.

Id. at 504. In 1947, the Court noted, Congress amended the definition of "employer" to exclude nonprofit hospitals. The Court then discussed the 1959 amendments and ruled that Congress "made no changes in the definition of 'employer' and the legislative history contains no reference to church-operated schools." *Id.* at 505, n.11. Finally, the Court reviewed the NLRA's 1974 amendments which removed the exemption for nonprofit hospitals. The Court stated that:

> The Board relies upon that amendment as showing that Congress approved the Board's exercise of jurisdiction over church-operated schools. A close examination of that legislative history, however, reveals nothing to indicate an affirmative intention that such schools be within the Board's jurisdiction.

Id. at 505.

Accordingly, although *Catholic Bishop* discusses the role of teachers, the Court's final decision rests upon its finding that Congress did not grant the Board jurisdiction over a certain type of employer, a church-operated school. The Ninth Circuit ignored this Court's discussion of the type

of employer covered by the NLRA and ruled that only one type of employee, a teacher, is outside the Board's jurisdiction. Hanna's petition for a writ of certiorari must be granted because the Ninth Circuit's ruling conflicts with this Court's decision in *Catholic Bishop*.

C. This Court Must Determine Whether The Board's Jurisdiction Extends To A Church-Operated School And Its Nonteaching Employees.

If, in *Catholic Bishop*, this Court determined solely that the Board's jurisdiction does not extend to teachers in a church-operated school, an important question of federal law has been left open by *Catholic Bishop*: Whether the Board has jurisdiction over a church-operated school and its nonteaching employees. A threshold issue in any representation case is whether the Board has jurisdiction over the employer. If the Board does not have jurisdiction over the employer, it is powerless to process a union's representation petition. *NLRB v. First Termite Control Co.*, 646 F.2d 424 (9th Cir. 1981); *NLRB v. Herbert Harvey, Inc.*, 385 F.2d 684 (D.C. Cir. 1967). The Board is precluded from asserting jurisdiction over various types of employers.[3/] Accordingly, this Court must determine

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3/ The Board may not assert jurisdiction over airline and railway employers. *NLRB v. Interior Enter., Inc.*, 298 F.2d 147 (9th Cir. 1961). The Board may not assert jurisdiction over political subdivisions of a state. *Museum Assoc. v. NLRB*, 688 F.2d 1278 (9th Cir. 1982); *Ayres v.*

(continued...)

whether the Board has jurisdiction over a certain type of employer, a church-operated school.

If the Board has jurisdiction over the employer, it must then be determined whether the Board has jurisdiction over the employees. The employees in this case include persons who act as surrogate parents to students in a church-operated, residential school. Given the constitutional dangers inherent in the Board's assertion of jurisdiction over surrogate parents in a religious school, it is incumbent upon this Court to determine whether the Board's jurisdiction extends to the nonteaching employees of church-operated schools. It is imperative that Hanna's petition for writ of certiorari be granted to resolve these important federal questions concerning NLRA jurisdiction.

III. This Court Must Determine Whether, By Asserting Jurisdiction, The Board Violated Hanna's First Amendment Rights.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court decided that church-operated schools are not within the NLRB's jurisdiction, thereby avoiding the necessity of reaching the second question for which it granted *certiorari* -- whether the Board's assertion of jurisdiction violates the guarantees of the Religion Clauses. The issue

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3/(...continued)
IBEW, 666 F.2d 441 (9th Cir. 1982). The Board may not assert jurisdiction over a foreign-owned ship. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

which the Court saw so clearly in *Catholic Bishops* -- whether NLRB assertion of jurisdiction over employees of a church-operated school violates the guarantees of the First Amendment -- still requires the Court's review. Review is even more warranted today than it was in *Catholic Bishop*, especially where employees other than teachers have a role in the religious development of students (in the instant case -- on a 24-hour a day basis).

As church-operated schools, especially Catholic schools, are permeated with a religious mission, all employees of the schools, not just teachers, are guided by religious goals and are subject to the doctrines and moral teachings of the church. The overarching religious purpose of these schools controls all of their employees, and the Court should now determine once and for all whether NLRA jurisdiction over church-operated schools and their employees violates the Religion Clauses.

A. The Establishment Clause.

While the NLRA has a secular purpose and a primary effect that neither enhances nor inhibits religion, application of the NLRA to nonteaching employees at church-operated schools would violate the third prong of the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that it would foster excessive state entanglement with religion.

> Most of the cases in which the court has divided over the "entanglement" part of the *Lemon* test have involved aid to parochial

> schools; in *Aguilar v. Felton*, for example, the Court's finding of excessive entanglement rested in large part on the undisputed fact that the elementary and secondary schools receiving aid were "pervasively sectarian" and had "'as a substantial purpose the inculcation of religious values.'"

Bowen v. Kendrick, 487 U.S. 589, 616 (1988).

The Court in *Catholic Bishop*, 440 U.S. at 503, said:

> What we said in *Lemon*, . . . applies as well here:
>
> "[P]arochial schools involve substantial religious activity and purpose.
>
> "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid."

Hanna's religious mission is suffused in all of its activities carried out by all of its employees. As Hanna and other church-operated schools are pervasively sectarian and have substantial religious activity and purpose, there is a clear danger that jurisdiction over their employees would constitute excessive entanglement. Given the vast number of church-operated schools in the United States, this is a question that the Court should review and determine.

Nonteaching employees at church-operated schools undertake religious activities and serve religious purposes at the direction of the school administration. All employees at

these schools fall within the penumbra of the religious mission of these schools, and should not be able to espouse overtly to impressionable youth positions which are contrary to the school's religious doctrines or teachings. Church schools must be able to terminate all employees who do not comport with the institutions' religious teachings, without having those actions made subject to review by an administrative agency or an arbitrator. If charges are filed relating to employment actions mandated by the religious creed of church-run schools:

> The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators in its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

Catholic Bishop, 440 U.S. at 502.

If a child care worker were disciplined because he or she refused to supervise daily prayers or because he or she advocates to students under his or her care a position contrary to the fundamental teachings of the church, i.e., on abortion, birth control, homosexuality, or, say, in these contemporary times, the provision of condoms to the student populace, this obviously would require the NLRB or an arbitrator to delve into issues of theology and Catholic teaching. Given the

prevalence and vehemence of the debate on these modern social issues, it is inevitable that they will crop up at any institution that acts as surrogate parents to young men on a 24-hour basis. The Court should consider and determine whether excessive entanglement could result from a government compelled review of such fundamental church teachings on these contemporary issues.

This Court previously stated:

> "The Board's exercise of jurisdiction will have at least one other impact on church-operated schools. The Board will be called upon to decide what are 'terms and conditions of employment' and therefore mandatory subjects of bargaining."

Catholic Bishop, 440 U.S. at 502-03. Any required bargaining over the terms and conditions of these employees that have religious overtones -- such as their involvement in prayers or with religious studies -- necessarily will alter or inhibit the religious character of their employment.

As there is a clear implication that the Establishment Clause may be violated by the Board's assertion of jurisdiction over nonteaching employees at church-run schools, especially employees who act as surrogate parents, the Court should grant *certiorari* to decide the issue presented by Petitioner.

B. The Free Exercise Clause.

Applying the factors established by this Court in *United States v. Lee*, 455 U.S. 252 (1982), *Thomas v. Review Bd., Indiana Employment Sec. Div.*, 450 U.S. 707 (1981), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), compels the conclusion that the Board's assertion of jurisdiction over church-operated schools violates the Free Exercise Clause.[4/]

First, the Board's assertion of jurisdiction over church-operated schools will significantly burden their ability to establish and control the carrying out of Catholic Church teachings and religious activities. Regardless of the administrator's religious dictates, he or she will be required to negotiate terms that would otherwise be determined exclusively by Catholic doctrine. Such an impediment is more than incidental -- it goes to the very heart of the school's ability to shape the atmosphere by which it instills Catholic values in its students.

Second, the Board has no compelling interest in asserting jurisdiction over church-operated schools. The thrust of the NLRA is to preserve harmonious labor relations in industries substantially affecting commerce. *Local 24 of Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959).

4/ Petitioner believes that *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) is not controlling in that the facts herein do not concern an across-the-board criminal prohibition on a particular form of conduct. Should that not be sufficient to distinguish *Smith*, Petitioner submits that *Smith* should be revisited. Otherwise, *Smith* has served to eviscerate the Free Exercise Clause.

However, for several decades, the Board did not assert jurisdiction over private educational institutions because they had an insignificant impact on interstate commerce. *Cornell Univ.*, 183 N.L.R.B. 329 (1970); *Catholic Bishop*, 440 U.S. at 497-499. A nonprofit religious institution has even less commercial impact than nonreligious private schools. Hence, the Board's interest in asserting jurisdiction over church schools cannot be great.

Third, accommodating the religious beliefs of these schools would not unduly interfere with the fulfillment of the government interest. NLRB jurisdiction would continue to apply to employers affecting interstate commerce and to the majority of the American work force.

There are a significant number of church-operated schools whose free exercise rights would be affected by Board-imposed constraints on their ability to supervise employees consistent with fundamental church doctrine. For this reason, the Court should grant review.

IV. The Court Should Grant Review Because The Board's Unreasonable Delay Precludes The Enforcement Of Its Bargaining Order.

A. The Board's Delay Violated The APA.

The Board's delay of over six years in determining its own jurisdiction so far departed from the accepted and usual scope of administrative/judicial proceedings as to call for an

exercise of this Court's power of supervision. The Ninth Circuit ruled that the Board's delay violated the APA's requirement that an agency conclude any matter submitted to it "within a reasonable time." 5 U.S.C. §555(b). In fact, the court ruled that "[t]he delay in this case can hardly be called 'reasonable.' It is egregious, and we deplore it" (Appendix A, A-8). Nevertheless, the Ninth Circuit enforced the Board's bargaining order. The Board's delay violated the APA and its enforcement of the election certification was in excess of its jurisdiction. A writ of certiorari must be granted so that this Court may define the limits of the Board's powers under the APA and send a message to the Board that its abuse of administrative powers will not be tolerated.

B. The Ninth Circuit's Ruling Conflicts With The Seventh And Second Circuits' Stated Positions Concerning Board Delay.

The Seventh Circuit has considered the manner in which the Board should be sanctioned for its own delay. In *Continental Web Press v. NLRB*, 742 F.2d 1087 (7th Cir. 1984), the case was remanded because of the Board's failure to apply traditional policies. However, noting Board-caused delay and high employee turnover, the court also informed the Board that:

> Delays in this proceeding that are the Board's responsibility rather than the employer's persuade us that if the Board on remand again orders the company to bargain

> with the union, and then asks us to enforce its order, we will turn the Board down because of unreasonable delay. . . . The Board has only itself to blame for having let this proceeding stretch out to the point where it is quite likely that a bargaining order would be irrelevant to the current conditions in the plant. When the Board asks a court of appeals to enforce the Board's order, it is appealing to the court's equitable powers and is subject to some, at least, of the traditional defenses to requests for equitable relief -- and among them is the defense of laches, or unreasonable delay.

Id. at 1094-95. Similarly, in cases where delay and turnover are coupled with procedural mistakes made by the Board, the Seventh and Second Circuits have dismissed cases rather than remand because delay and turnover have created serious questions as to whether a majority of current employees desire union representation. *NLRB v. Katz*, 701 F.2d 703, 709 (7th Cir. 1983); *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871, 881 (2d Cir. 1982); and *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906, 914 (2d Cir. 1981).

Hanna presented evidence to the Board that after the Board's delay, only seven of the thirty-five persons eligible to vote in Hanna's 1981 election remained employed in bargaining unit positions. In these circumstances, the Seventh and Second Circuits have stated that a bargaining order should not be enforced. The conflict between the stated

position of these Circuits and the Ninth Circuit's ruling in this case must be resolved by this Court.

V. The Board May Not Be Allowed To Assert Jurisdiction Based On Stale Evidence.

During the Board's delay, there were changes in Hanna's corporate status, Bylaws, Mission Statement and actual duties of employees within the bargaining unit. This evidence affected the Board's jurisdiction over Hanna. However, the Board rejected or ignored this evidence (Appendix B, D, E and F). The Board's failure to determine its jurisdiction based upon current evidence raises substantial issues of federal administrative and judicial process which must be decided by this Court.

The Board's jurisdiction over an employer may be questioned at any time. *St. Elizabeth Hospital v. NLRB*, 715 F.2d 1193, 1196 (7th Cir. 1983).[5/] Therefore, when determining its own jurisdiction, the Board must base its finding on circumstances as they exist at the time jurisdiction is asserted. *Burns Elec. Sec. Serv., Inc. v. NLRB*, 624 F.2d 403, 408 (2d Cir. 1980) (Board required to review new and

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5/ The NLRA dictates that unfair labor practice proceedings be conducted in accordance with the Federal Rules of Civil Procedure. 29 U.S.C. § 160(b). Thus, whenever the Board's jurisdiction is questioned by credible evidence, it is duty-bound to review, consider and rule on its continuing subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3); *Libhart v. Santa Monica Dairy*, 592 F.2d 1062, 1064 (9th Cir. 1979).

changed evidence implicating the Board's jurisdiction), *Cf. Museum Associations v. NLRB*, 688 F.2d 1278, 1281 (9th Cir. 1982) (Board order enforced without prejudice to reopening if events caused Board to lose jurisdiction). The Ninth Circuit erred by allowing the Board to assert jurisdiction based upon stale evidence. Consequently, this Court should grant review to clarify the obligation of the Board not to assert jurisdiction when the factual basis for such jurisdiction has materially changed due to the passage of time caused by the Board's unreasonable delay.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted to decide important questions of federal law and to resolve conflicts in the appellate courts.

DATED: February 27, 1992

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* and Social Services Union Local 535 SEIU, AFL-CIO *Intervenor,* v. HANNA BOYS CENTER, *Respondent.*	No. 89-70385 NLRB No. 20-CA-22106 ORDER AND AMENDED OPINION

On Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted
February 13, 1991—San Francisco, California

Filed August 7, 1991
Amended October 30, 1991

Before: Mary M. Schroeder, William C. Canby, Jr. and John T. Noonan, Jr., Circuit Judges

Opinion by Judge Canby

ORDER

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and of the amended opinion, and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

OPINION

CANBY, Circuit Judge:

Hanna Boys Center appeals the National Labor Relation Board's order requiring Hanna to bargain with Social Services Union Local 535 of the Service Employees International Union. Hanna contends that the National Labor Relations Act does not confer jurisdiction over Hanna on the Board, or, if it does, that the exercise of such jurisdiction violates the religion clauses of the first amendment. Hanna also objects to the Board's delay of over six years in reviewing Hanna's appeal of the decision to assert jurisdiction, and the Board's refusal, in light of that delay, to reopen its certification determination to receive evidence of current facts. We affirm.

BACKGROUND

This appeal arises out of the Union's protracted and vigorously contested attempt to represent certain lay non-faculty employees of Hanna, a residential school for boys that is owned and, arguably, operated by the Roman Catholic Church. The Union has intervened in this appeal. The parties dispute the degree of control and supervision exercised by the Church and the degree to which religion suffuses the school's mission. They also dispute the degree to which religion affects the duties of the employees that are the subject of this dispute: lay child-care workers, recreation assistants, cooks, cooks' helpers, and maintenance workers. Hanna asserts that the school is closely supervised by the Church, that its religious mission pervades its operations, and that every employee plays a role in furthering that mission. The Board's actions are based on a different view of the facts. The Board characterizes Hanna's religious mission, and its supervision by the Church, as minimal. More important to its ruling, the Board also found that the duties of the employees involved here are overwhelmingly secular.

Hanna provides education and residential supervision for boys aged ten through seventeen, pursuant to California's Nonprofit Religious Corporation Law, Cal. Corp. Code §§ 9110-9690 (West. Supp. 1991). Its Articles of Incorporation in effect at the time of the Board's 1981 assertion of jurisdiction state that its purpose is

> [t]o provide for the protection, care and education of homeless or neglected children;

> to provide homes for them; to provide, alone or in conjunction with other organizations, for their mental, moral, physical and spiritual training during their minority and thereafter; and to assist, financially and otherwise, other non-profit tax exempt organizations engaged in similar or related activities.

In September 1980, the Union petitioned the Board for permission to conduct an election to determine representation of certain of the non-teacher employees of Hanna. Hanna and the Union stipulated that two bargaining units were appropriate. Unit A, the one involved in this appeal, consisted of child-care workers, recreation assistants, cooks, cooks' helpers, and maintenance workers. This unit voted in favor of union representation. Unit B, which voted against Union representation, consisted of all office clerical employees. All professional workers, priests, nuns, and religious brothers were excluded from both units. Because only Unit A voted in favor of representation, it alone was the subject of the Board's bargaining order that we now review.

In February 1981, the Regional Director asserted jurisdiction, finding that Hanna was not a "church-operated" school within the holding of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (Board jurisdiction over teachers in church-operated schools not conferred by NLRA). In March 1981, the Board granted Hanna's request for review of the Director's assertion of jurisdiction. An election was held on March 18, 1981. The ballots in that election were

impounded, pending board review of the assertion of jurisdiction.

In July 1987, six years and four months after the election and the Board's grant of review, the Board upheld the Director's assertion of jurisdiction, but with a different rationale. *Hanna Boy's Center & Social Services Union, Local 535, SEIU*, 284 N.L.R.B. 1080 (1987). The Board held that jurisdiction was properly asserted, relying on its earlier ruling in *Jewish Day School of Greater Washington*, 283 N.L.R.B. 757 (1987). In *Jewish Day School*, the Board ruled that *Catholic Bishop* did not prohibit jurisdiction over all employees of church-operated schools, but rather only over teachers employed by church-operated schools.

As to the Hanna employees at issue here, the Board noted that, "with the exception of child-care workers, the record is silent with respect to how these employees are in any way connected to the possible religious mission of the Center." 284 N.L.R.B. at 1083. It also rejected Hanna's argument that the child-care workers are "analogous to teachers":

> There is no indication in the record that the child-care workers are required to, or do in fact, involve themselves in the religious or secular teaching of the entrants. The child-care workers function as someone akin to a 'dormitory monitor'. . . The child-care workers are clearly less involved in the religious inculcation of the entrants than the

> teachers are. The sensitive first amendment issues surrounding the assertion of jurisdiction over teachers noted by the Court in *Catholic Bishop* are not involved in the assertion of jurisdiction over the child-care workers and other unit members in the present case.

Id.

Hanna moved for reconsideration, and sought to submit evidence as to the "current" facts supporting Hanna's position that Board jurisdiction was prohibited by *Catholic Bishop*, and violated the religious clauses. The Board denied these motions. After an unsuccessful attempt by Hanna to enjoin the Board from exercising jurisdiction,[1/] the Board, in February 1988, counted the ballots. Unit A, the employees at issue here, voted for Union representation, and in April 1988, the Board certified the Union as their representative. Hanna objected to the election and to the certification.

1/ After denial of its motion for reconsideration, Hanna filed an action in federal district court seeking a declaration that the Board lacked jurisdiction, and an injunction against ballots being counted. The district court ordered a 90 day stay, suggesting that, in light of the lengthy delay, the Board should consider supplemental evidence of current conditions. The Board appealed the stay. In a one-sentence Order, a motions panel of this Court reversed and vacated the stay. The district court subsequently dismissed Hanna's action for lack of subject matter jurisdiction. Hanna appealed that dismissal, and this court affirmed in *Hanna Boys Center v. Miller*, 853 F.2d 682 (9th Cir. 1988). In that opinion, we held that the motions panel's earlier Order implicitly relied on a finding of lack of subject matter jurisdiction, and that such a finding constituted the law of the case.

In order to obtain review of the Board's decision, Hanna refused to bargain with the Union or to provide it with information pertinent to representation. In March 1989, the Board found Hanna to have engaged in unfair labor practices and issued an order requiring Hanna to bargain with the Union. The Board based its ruling on the record before the Board in the 1980-81 proceedings. The Board refused to reopen the factual record, ruling that the evidence offered was not newly discovered and previously unavailable evidence in existence at the time of the original proceedings. The Board further ruled that there were no special circumstances justifying reopening those proceedings. This appeal followed.

DISCUSSION

A. Delay

Before we turn to the merits of the Board's decision, we consider the effect of the Board's delay in ruling on Hanna's appeal of the Board's original assertion of jurisdiction. Hanna raises two arguments based on that delay, one of which concerns the scope of the factual record under review. Hanna argues first that, on account of the delay, the Board's order to negotiate should not be enforced. Alternatively, Hanna argues that the Board should have reopened the record to admit evidence of "current" facts, and based its review on that evidence.

1. Delay as a basis for denying enforcement

The APA requires that all administrative agencies, including the Board, conclude any matter submitted to them "within a reasonable time." 5 U.S.C. § 555(b). The delay in this case can hardly be called "reasonable." It is egregious, and we deplore it. There is no suggestion here that either Hanna or the Union contributed to this delay. As it turns out, however, the beneficiary of that delay is Hanna, which has received over six years of reprieve from the Board's jurisdiction which it resists on this appeal. The victims are the employees who voted in 1981 for union representation.

[1] The APA does not require refusal to enforce an administrative order as a remedy for failure to abide by section 555(b). We decline to impose such a sanction, when its effect would only be to continue the deprivation of the right of these employees to union representation, as provided by the NLRA. Instead, we adopt the practice of the Second and Seventh Circuits when faced with similar Board-caused delay:

> We believe that frustration of the policies of the [LMRA] is an inevitable result of the egregious administrative delay in this case no matter how we rule. Because we conclude that fewer policies are frustrated by enforcement than by nonenforcement, we choose the former.

NLRB v. Parents & Friends of the Specialized Living Center, 879 F.2d 1442, 1457 (7th Cir. 1989), quoting *NLRB v. Star Color Plate Serv.*, 843 F.2d 1507, 1509-10 (2d Cir.), *cert. denied*, 488 U.S. 828 (1988).

2. *The propriety of refusing to receive new evidence.*

In conjunction with its motion for reconsideration of the Board's decision, Hanna sought to introduce evidence of "substantial changes in Hanna's corporate status, Bylaws, Mission Statement and actual duties of employees within the unit" that had occurred after 1981. The Board rejected that evidence, ruling that the proffered evidence was neither "newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding." *Hanna Boys Center and Social Services Union Local SEIU*, 293 N.L.R.B. No. 39, 130 LRRM 1430, 1431 (March 21, 1989). Hanna argues that the Board erred in refusing the proffered evidence and, thus, improperly affirmed its jurisdiction on the basis of stale evidence.

[2] Hanna's request to reopen the record amounts to a request that the board start afresh with completely new determinations of the appropriateness of its jurisdiction. Such a procedure is not warranted by the nature of the "new" facts offered here, and is prohibited by settled rules. The Board, and this court, have firmly enforced the Board's regulation

that in the absence of special circumstances[2/], it will not accept new evidence unless the moving party shows that the additional evidence is "newly discovered," that is, it was in existence at the time of the proceeding before the Board, but has become available only since the close of the hearing. 29 C.F.R. Sec. 102.48(d)(1). That regulation further provides that the Board will not reopen the record unless the moving party also demonstrates "that the new evidence would require a different result." *Id. See NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375, 1380-81 (9th Cir. 1987).

[3] That regulation is complemented by the rule, repeatedly affirmed by this court, that "passage of time for the orderly adjudication of labor disputes cannot be used as a basis for denying an enforcement order. The relevant period for determining the appropriateness of the bargaining order is as of when it was before the NLRB." *NLRB v. Coca-Cola Bottling Co.*, 472 F.2d 140, 141 (9th cir. 1972) (citations omitted). *See NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1448 (9th Cir. 1991), and cases cited therein. A review of those cases demonstrates that "before the NLRB" refers to the factual circumstances presented to the Board upon which it originally acted, not the circumstances at the time the board ruled on an appeal of that action. *See, e.g., L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1353 (9th Cir. 1980) (As to whether the "[B]oard should consider subsequent events, up to the time of its [reviewing] decision

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2/ The Board held, and we agree, that Hanna had shown no special circumstances justifying an exception in this case.

. . . we find no cases in this circuit that remand to the Board because of a lack of evidence on the record of consideration of such events"). Finally, it is well settled that "[t]he Board has considerable discretion in the grant or denial of a motion to reopen the record [and] [t]he Board's decision on such a motion will not be set aside unless shown to constitute an abuse of discretion." *Cutter Dodge*, 825 F.2d at 1380.[3/]

Hanna concedes that it supplemental evidence attests only to facts that came into existence after the Board initially asserted jurisdiction in 1981. While the Board's delay here may constitute an abuse of its obligation to enforce the NLRA and to abide by the APA, we do not believe that its refusal to reopen the record was such an abuse of discretion that we should remand to require it, in effect, to start all over again. We proceed, then, to review the Board's order on the record properly before the Board. *See* Fed. R. App. P. 16(a); 29 U.S.C. § 160(e).

3/ We reject Hanna's argument that these rules apply only when the employer or the union cause the delay. We have, indeed, acknowledged that one reason for these rules is to avoid "put[ting] a premium upon continued litigation by the employer; [whereby] it can hope that the resulting delay will produce a new set of facts, as to which the Board must then readjudicate." *NLRB v. L.B. Foster Co.*, 418 F.2d 1, 4 (1969). The rule is not limited to those facts, however: "*[R]egardless of fault*, [delay] is an unfortunate but inevitable result of the process of hearing, decision and review prescribed in the Act." *Id.* (emphasis added). The ultimate policy which these rules serve was succinctly stated in *L'Eggs*: "There must be an end to litigation in Labor Board cases." 619 F.2d at 1353.

B. The Board's Statutory Jurisdiction

1. Standard of Review

We review de novo the Board's purely legal conclusion that *Catholic Bishop* applies only to teachers in parochial schools. *NLRB v. Buckley Broadcasting Corp. of California*, 891 F.2d 230, 232 (9th Cir. 1989)., *cert. denied*, 110 Sct. 2619 (1990). We review for substantial supporting evidence the Board's factual finding that none of the employees here were functionally equivalent to teachers. *Id.*; 29 U.S.C. § 160(e) (1988). We will affirm that finding "if there is a choice between two fairly conflicting views of the evidence, 'even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *M.W. Kellogg Constructors, Inc. v. NLRB*, 806 F.2d 1435, 1438 (9th Cir. 1986) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

2. The Scope of Catholic Bishop

[4] No one disputes that the plain language of the National Labor Relations Act encompasses the employment relationship between Hanna and these employees. *See* NLRA § 10(a), 29 U.S.C. 160(a) (1988). Hanna argues, however, that the restriction on the Board's jurisdiction imposed in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), applies here. We disagree.

In *Catholic Bishop*, the Supreme Court reviewed the Board's assertion of jurisdiction over lay faculty members at

two groups of Catholic high schools. The Court granted certiorari to consider two issues:

> (a) Whether teachers in schools operated by a church . . . are within the jurisdiction granted by the [NLRA]; and (b) if the act authorizes such jurisdiction, does its exercise violate the guarantees of the Religion Clauses . . . .

440 U.S. at 491.

The court answered the first question in the negative, to avoid the severe constitutional problems presented by the second. The Court recognized "the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *Id.* at 501. It noted the constitutional difficulties that would result from Board jurisdiction over the relationship between such teachers and their employers. After reviewing the legislative history of the NLRA, the Court concluded that

> in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

Catholic Bishop, 440 U.S. at 507.

[5] Hanna contends that the effect of *Catholic Bishop* is to exclude church-operated schools, as entire units, from the coverage of the NLRA. It refers to the following statement of the Court:

> Congress simply gave no consideration to church-operated schools. . . .
>
> * * *
>
> . . . A close examination of that legislative history . . . reveals nothing to indicate an affirmative intention that such schools be within the Board's jurisdiction.

Catholic Bishop, 440 U.S. at 504-05. Despite this language, we think it is clear from the rest of the Court's opinion that the ruling of *Catholic Bishop* is not nearly so broad as Hanna contends.

[6] The facts of *Catholic Bishop* are confined to Board jurisdiction over teachers. Other employees of parochial schools, whether professional or "blue collar," are expressly excluded from the ruling. *Id.* at 493 n.5. The Court did not base its holding simply on congressional failure to consider church-operated schools *per se*, as the selective quotation relied upon by Hanna might imply. The difficult constitutional question that the Court sought to avoid was that which would flow "from the Board's exercise of jurisdiction

over teachers in church-operated schools." *Id.* at 504.[4/] That point was reiterated throughout the Court's opinion,[5/] and it was clearly founded on the "unique role" of teachers in accomplishing the religious goals of the school. *Id.* at 501.

4/ Here . . . the record affords abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses." *Catholic Bishop*, 440 U.S. at 507.

The opinion notes that the Seventh Circuit opinion which it was reviewing had recited a number of actual instances of Board jurisdiction over church-operated schools which had provoked first amendment challenges. *Id.* at 502. A review of those examples reveals that every such challenge involved teachers. *See Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1125-26 (7th Cir. 1977).

5/ The court repeatedly discusses the effect of board jurisdiction over teachers as teachers, not as proxies for other employees. *See, e.g.*:

> The key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement. . . .
>
> Only recently we again noted the importance of the teacher's function in a church school: "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Meek v. Pittenger*, 421 U.S. 349, 370 (1975).

Catholic Bishop, 440 U.S. at 501.

> The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school.

Id. at 504.

> Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.

Id. at 506.

That was the concern which led the Court toward a construction of the NLRA that excluded the Board's jurisdiction over disputes involving such teachers, and which caused the Court to comb the legislative history to see whether anything in it foreclosed such a construction. Its review satisfied the Court that "[t]here is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." *Id.* at 504. Both the rationale and the language of the *Catholic Bishop* opinion accordingly support the limitation of its holding to the employment relationship between the church-operated schools and its teachers.[6/]

6/ Although this court has not yet faced this precise issue, two of our previous cases, dealing with closely related concerns, have emphasized *Catholic Bishop's* exclusive focus on teachers. *See St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, 1440 (9th Cir. 1983) (*Chicago Bishop* does not prohibit Board jurisdiction over non-religious service employees of church-run hospital); *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349, 1353 (9th Cir. 1981) (*Chicago Bishop* does not prohibit Board jurisdiction over employees of a church's commercial operations.)

Hanna cites two Second Circuit cases in support of its broad reading of *Catholic Bishop*. *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 819-20 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *Christ the King Regional High School v. Culvert*, 815 F.2d 219, 222 (2d Cir. 1987), *cert. denied*, 484 U.S. 830 (1987). Those opinions both contain statements that *Catholic Bishop* ruled that the Board lacked statutory jurisdiction over church-operated schools. We are not dissuaded from our conclusion by those statements, however, because both cases also contain statements that *Catholic Bishop* precludes Board jurisdiction over teachers in church-run schools. Further, neither opinion discussed the issue of the scope of *Catholic Bishop's* ruling, nor were their broader descriptions of that ruling necessary to their decisions, since both cases dealt only with bargaining units composed solely of teachers.

Of course, the rationale of *Catholic Bishop* would also support the exclusion from the Board's jurisdiction of other employment relationships if they involved the same constitutional problems inherent in the relationship between teachers and church-operated schools. For reasons that we will make clear below, we are convinced that there are no such severe constitutional questions raised by the Board's exercise of jurisdiction over the relationship between Hanna and its secular employees who are not significantly involved in teaching. We are not constrained, then, as the Supreme Court was in *Catholic Bishop*, to construe the NLRA more narrowly than its plain language invites. We interpret the Act to apply to Hanna's non-teaching employees involved in this appeal.

3. Child-care workers as teachers

Hanna argues, alternatively, that even if *Catholic Bishop* prohibits Board jurisdiction only over teachers in parochial schools, the employees here are the functional equivalent of teachers, and therefore within the holding of *Catholic Bishop*.

[7] We reject as unsupported by the record any suggestion that Hanna's cooks, cook's helpers, recreation assistants and maintenance workers are to any significant degree "teachers" whose role is particularly involved with the accomplishment of the religious goals of Hanna. For all that appears, cooks primarily prepare food. Comparable conclusions can easily be drawn from the record regarding the other employees of the bargaining unit, with the possible

exception of the child-care workers. Even there, however, the record supports the board's finding that the role of the child-care workers was not significantly involved with religion. The Board described their duties as follows:

> Child-care workers "shepherd" the boys from their cottages to chapel, supervise the boys in their cottages, and make sure the boys do their housekeeping chores and homework (which may include work from the moral guidance course), see that the boys say their prayers, and select a boy to say the evening prayer. The child-care worker job description lists eight basic responsibilities as well as qualifications for the job. The only reference to the child-care workers' involvement in religious activity is in 1(D) of the listing of responsibilities. . . . This includes "D. Teaching values: ethical principles, religious observances." The qualifications section contains no reference to religion.
>
> There is no indication in the record that the child-care workers are required to, or do in fact, involve themselves in the religious or secular teaching of the entrants. The child-care workers function as someone akin to a "dormitory monitor," an authority figure to supervise the entrants when they are not in class.

Hanna Boys Center, 284 N.L.R.B. at 1083. Thus, while their job description includes a teaching function, the Board found no evidence that the actual duties of the child-care workers included any teaching. Supporting that finding is the fact that Hanna stipulated to this bargaining unit, suggesting that Hanna considered child-care workers similarly situated for labor relations purposes with cooks and maintenance workers.

[8] Hanna paints a different picture of the child-care workers and the other affected employees, asserting that they are intimately involved with the students as spiritual and theological mentors. Our review, however, is confined to determining whether the board's findings of fact are supported by substantial evidence in the record. *NLRB v. Buckley Broadcasting Corp. of California*, 891 F.2d 230, 232 (9th Cir. 1989), *cert denied*, 110 S. Ct. 2619 (1990). The record which we review is that which was before the Board in its review of the Director's assertion of jurisdiction in 1981. Fed. R. App. P. 16(a); 29 U.S.C. § 160(e). There is ample support in that record for the Board's finding that these employees, including the child-care workers, are secular employees with no teaching function. We conclude, therefore, that all of the employees in Bargaining Unit A are within the statutory jurisdiction of the Board.

C. The Constitutionality of Board Jurisdiction

In light of its construction of the NLRA, the Supreme Court in *Catholic Bishop* did not have to face the second issue for which it granted certiorari -- "if the act authorizes such

jurisdiction, does its exercise violate the guarantees of the Religion Clauses of the first amendment?" *Catholic Bishop*, 440 U.S. at 491. We reach that question here, and conclude that the Board's exercise of jurisdiction in the circumstances of this case is clearly constitutional.

1. The Establishment Clause

The establishment clause of the first amendment requires government neutrality with respect to religion. *Abington School District v. Schempp*, 374 U.S. 203, 215 (1963). It was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)). To pass constitutional muster, the Board's application of the NLRA to Hanna's non-teaching employees (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not foster excessive state entanglement with religion. *See Lemon*, 403 U.S. at 612-13.

Congress' purpose in enacting the NLRA was clearly secular -- to minimize industrial strife by protecting employees' rights to organize and bargain collectively. *NLRB v. Jones & Laughlin*, 301 U.S. 1, 42-43 (1937). Similarly, the NLRA's primary effect is to require collective bargaining and reduce labor disruptions, rather than to promote or deter the acceptance or perpetuation of any religion. *St. Elizabeth Community Hospital*, 708 F.2d 1436, 1441 (9th Cir. 1983). Nothing in the record suggests that the

Board's exercise of jurisdiction over Hanna deviated from this secular purpose or primary effect.

If there is any establishment clause violation here, it must be found in *Lemon's* third, "entanglement" prong. *Lemon* articulated three factors to be weighed in determining excessive entanglement: "the character and purpose of the institution[ ] that [is] benefited, the nature of the aid that the State provides, and the resulting relationship between government and the religious authority." *Lemon*, 403 U.S. at 615.

a. Character and purpose of Hanna

Hanna's purpose includes "mental, moral, physical, and spiritual training" of homeless or neglected boys, as well as providing for their "protection, care and education." Secular education, therapy and residential supervision are the primary activities of Hanna. The Board's description of Hanna's operations, however, demonstrates that Hanna is clearly, though loosely, affiliated with the Roman Catholic Church, and that religion plays a small but significant part in both its operations and its mission. *Hanna*, 284 N.L.R.B. at 1080-83. Control and direction of Hanna is vested in a Board of Directors and an Executive Director. The Board can include as many as 45 members of which only four can be clergy. Of those four, only two can vote. The Executive Director is appointed by the President/Bishop of Santa Rosa Diocese, subject to the approval of the Board. The Executive Director, who is responsible for the general direction and control of Hanna, need not be, but always has been, a priest.

There is no requirement that any employee or student of Hanna be Roman Catholic or associated with any other religious organization.

Hanna's students are required to attend chapel every morning for prayers and Mass on Sundays and Holy Days. There are prayers at the beginning and end of class as well as before and after all meals, and in the evening before the lights are put out. The curriculum includes a mandatory "moral guidance" class taught by nuns on the faculty. This class is principally devoted to the teaching of "salvation history," using the Bible and Catholic tradition as sources, as well as exposing the boys to the tenets of other religions. These features of Hanna's operation demonstrate that, although Hanna's primary purpose and character is secular -- to provide housing, education and therapy to "homeless or neglected" boys -- the Catholic faith of its founders is woven thoroughly into the institution.

b. Nature of the activity the government mandates -- Board jurisdiction

[9] Although Hanna as an institution is infused with an important religious component, there is substantial evidence in the record to support the Board's determination that Hanna's religious character and mission is furthered by others than the employees of Bargaining Unit A. The employees of Unit A do not conduct religious services or teach moral guidance or any other subjects. Indeed, those functions are performed by priests, nuns, religious brothers and professional workers who are excluded from any

bargaining unit. Board jurisdiction over the employment relations between Hanna and the employees of Bargaining Unit A will be confined to overseeing issues arising in the area of labor relations and collective bargaining. Because those employees' duties, as found by the Board, are overwhelmingly secular, arbitration of grievances arising out of that employment should not involve the Board in issues of theology. Nor will it render any benefit to the Catholic religion or any other religion, or advance non-religion over religion generally. Furthermore, neither Hanna nor the Roman Catholic Church embraces any religious tenets that would be affronted by unionization or collective bargaining. Unlike the jurisdiction over parochial school faculty dealt with in *Chicago Bishop*, Board jurisdiction over these employees should involve the Board minimally, if at all, in Hanna's religious mission.

c. The resulting relationship between government and Hanna

Board jurisdiction here will require governmental involvement only with respect to specific charges which may be filed on behalf of these employees. It will not involve the board in continuing or systematic monitoring of the Church's activities and should not involve monitoring the religious aspects of Hanna's activities at all. Board involvement will not create the reality or the appearance of the government's supervising or collaborating with the Church.

d. Weighing

As the Court recognized in *Lemon*, "total separation between church and state . . . is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." 403 U.S. at 614. Unlike the situation in *Lemon* and the cases *Lemon* cites, Board jurisdiction here does nothing to "establish" religion. Nor does Board jurisdiction here present a threat to government neutrality with respect to religion. Thus, it is purely entanglement, per se, which Hanna asserts as the ground for a first amendment violation. That entanglement is not sufficient to create "active involvement of the sovereign in religious activity." *Lemon*, 403 U.S. at 612.

[10] This court's conclusion in *St. Elizabeth Hospital*, aptly describes the situation before us:

> Board involvement with [this institution] will be limited and will present only a minimal burden upon the religious practices of the [institution's] operators. Board jurisdiction will produce only incidental intrusion by requiring examination of [the institution's] actions and conduct only with respect to specific charges which may be filed in the limited area of collective bargaining and labor relations. Certainly there is no prospect of continuing government surveillance of the type of the Supreme Court condemned in *Lemon*. . . .

708 F.2d at 1442 (citation omitted). Because of the extremely limited intrusion of Board jurisdiction on the religious aspects of Hanna's operations, there is no establishment clause violations here.

2. *Free exercise clause*

Hanna also argues that Board jurisdiction over these employees violates Hanna's right of free exercise of religion, by unduly intruding into its affairs, and burdening its "ability to shape the atmosphere by which it instills Roman Catholic values in its students."

An initial question arises concerning what standard should be used to evaluate Hanna's free exercise claim. For the past twenty-five years, we have evaluated such claims through the use of the balancing test first established in *Sherbert v. Verner*, 374 U.S. 398 (1963). After the parties filed their briefs in this case, however, the Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990). *Smith* held that the free exercise clause is not violated if a law (1) is "generally applicable and otherwise valid," *id.* at 1600; (2) does not have as its "object" the burdening of religion and only has an "incidental effect" on religious practices or beliefs, *id.*; (3) does not implicate another constitutional right other than free exercise of religion and thereby give rise to a "hybrid claim," *id.* at 1601-02; and (4) punishes conduct which constitutes a criminal act. *See id.* at 1602-03; *see also The Supreme Court, 1989 Term -- Leading Cases*, 104 **Harv. L. Rev.** 198, 201 (1990) (listing these elements). The initial

question thus arises whether Hanna's claims should be evaluated using the traditional *Sherbert* balancing test or the more restrictive test authorized in certain situations by *Smith*.

Were this issue determinative, we would ask for supplemental briefing on the *Smith* test, although we have serious doubts regarding its applicability in light of part four of that test. We need not decide whether *Smith* applies, however, because we find that Hanna's free exercise claims do not survive even the less restrictive *Sherbert* balancing test. We have described that analysis as requiring the weighing of three factors: (1) how much Board jurisdiction will interfere with the exercise of religious beliefs; (2) the existence of a compelling or overriding state interest justifying a burden on religious beliefs; and (3) whether accommodating those beliefs would unduly interfere with the fulfillment of the government interest. *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1279 (9th Cir. 1982)."

Board jurisdiction will clearly circumscribe Hanna's operation, as suggested by the vigor with which Hanna resists such jurisdiction. However, under the first of these factors, "the relevant inquiry is not the impact of the statute upon the *institution*, but the impact of the statute upon the institution's exercise of its sincerely held *religious beliefs*." *Id.* at 1280 (emphasis added) (*quoting EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

Board jurisdiction here will not interfere with the free exercise of *religious beliefs* of anyone at Hanna. Catholic doctrine has no objection to unionization or collective bargaining. The pervasively secular nature of these employees' duties ensures that Board involvement in labor disputes will be confined to the secular aspects of Hanna's operations. Hanna's free exercise rights are scarcely implicated at all.

[11] Against this minimal showing of any impact on religious belief or practice, we must balance the compelling governmental interest in "promot[ing] the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 211 (1964). When these factors are weighed against each other, it is clear that Board jurisdiction here will not impermissibly interfere with Hanna's free exercise of religion. There is no violation, then, of the free exercise clause, whether tested by the traditional balancing analysis, or the broad categorical standard of *Smith*.

CONCLUSION

Catholic Bishop does not apply to the nonfaculty employees of Hanna involved in this appeal. The NLRA conferred authority on the Board to assert jurisdiction over this bargaining unit. Board jurisdiction here does not violate the first amendment's religion clauses. Therefore, the

board's order requiring Hanna to bargain with the Union, though unjustifiably tardy, shall be enforced.

ORDER ENFORCED.

APPENDIX B

Hanna Boys Center and Social Services Union Local 535, Service Employees International Union, AFL-CIO. Case 20-CA-22106

March 21, 1989

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On August 12, 1988, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and to furnish information following the Union's certification in Case 20-RC-15178.[1] (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.[2]

On October 12, 1988, the General Counsel filed a Motion for Summary Judgment. On October 17, 1988, the

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1/ The Board's decision is reported at 284 NLRB 1080 (1987).

2/ The Respondent also submitted nine affirmative defenses.

Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain and to furnish information to the Union,[3/] but attacks

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3/ The Respondent denies that the information requested is relevant and necessary to the Union's role as exclusive bargaining representative of the unit employees. It is well established, however, that the employees' wage and employment information sought by the Union is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Trustees of Masonic Hall*, 261 NLRB 436 (1982); *Verona Dyestuff Division Mobay Chemical Corp.*,233 NLRB 109 (1977). The respondent has not attempted to rebut the relevance of the information requested by the Union. We therefore find that no material issues of fact exist with regard to the Respondent's refusal to furnish the information sought by the Union.

The Respondent further denies that it receives any revenue within the meaning of the Act. The Respondent, however, admits that it "obtained in excess of $1,000,000 in donations, of which more than $2,000 was directly from points outside the state of California, during the fiscal year ending June 30, 1988." These jurisdictional facts, which are the same as were stipulated to by the Respondent in the representation proceeding as revenue, were sufficient to support the assertion of jurisdiction in the representation case. The Respondent may not here claim that the Board should not assert jurisdiction because it now, for the first time, characterizes its receipts as donations rather than revenues. The Respondent also denies, for the first time, that the Union is a labor organization within the meaning of the Act. The Respondent stipulated that the Union was a labor organization in the prior representation proceeding, and the Respondent may not now challenge that stipulation.

the validity of the certification in the underlying representation proceeding.[4/]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[5/]

4/ The Respondent attacks the certification on the basis that there are special circumstances and new evidence that compel further hearing. The Respondent contends that the board acted in excess of its authority and in violation of the Establishment and Free Exercise Clauses of the First Amendment to the constitution by asserting jurisdiction over it. It further argues that the Board unreasonably delayed administrative action and exceeded its statutory authority in this case; failed to consider pertinent and material new evidence submitted by the Respondent; and denied the Respondent due process by its perfunctory treatment of the Respondent's claims and its excessive delay between the election and certification. The Respondent also asserts that the bargaining unit is inappropriate, that the Board departed from its established practices and procedures in this case, and that the Board has deprived present employees of the Respondent of their Sec. 7 rights.

5/ The Respondent argues that new evidence submitted during the investigation of this unfair labor practice charge requires a new hearing. The Respondent has not shown that such evidence is newly discovered or previously unavailable. Thus, it will not be considered here. Sec. 102.48(d)(1) of the Board's Rules and Regulations. Further, even assuming we were to consider that evidence, such evidence would not alter our prior conclusion that the Board is not precluded from asserting jurisdiction over the Respondent. To the extent the evidence is alleged to

(continued...)

See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). There are no factual issues regarding the Union's request for information because the Respondent admitted that it refused to furnish the information. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a nonprofit corporation, with an office and place of business of Sonoma, California, operates a residential facility for boys, where it annually derives gross revenues in excess of $1 million and receives revenues in excess of $2000 directly from points outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

5/(...continued)
show that the Board lacks statutory jurisdiction, Chairman Stephens believes that the Board must consider it even if belatedly proffered; but he agrees with his colleagues that the Respondent has proffered no evidence sufficient to make that showing.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held March 18, 1981,[6/] the Union was certified on April 11, 1988, as the collective-bargaining representative of the employees in the following appropriate unit:

> Unit A: All full-time and regular part-time child care workers, recreation assistants, cooks, cooks helpers, and maintenance employees including plumbers, electricians, gardeners, and custodians employed by the Employer at its Sonoma, California location; excluding all other employees, professional employees, priests, nuns, and religious brothers, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since July 1, and April 13, 1988, respectively, the Union has requested the Respondent to bargain and to furnish information, and since July 14, 1988, the Respondent has refused. We find that this refusal constitutes an unlawful

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6/ The election involved two groups of employees designated as Units A and B. The Union was not certified as the representative of the employees in Unit B.

refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after July 14, 1988, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations board orders that the Respondent, Hanna Boys Center, Sonoma, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Social Services Union Local 535, Service Employees International Union, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time child care workers, recreation assistants, cooks, cooks helpers, and maintenance employees including plumbers, electricians, gardeners and custodians employed by the Employer at its Sonoma, California location; excluding all

other employees, professional employees, priests, nuns, and religious brothers, guards and supervisors as defined in the Act.

(b) On request, furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(c) Post at its facility in Sonoma, California, copies of the attached notice marked "Appendix."[7/] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

7/ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Social Services Union Local 535, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time child care workers, recreation assistants, cooks, cooks helpers, and maintenance employees including plumbers, electricians, gardeners and custodians employed by the Employer at

its Sonoma, California location; excluding all other employees, professional employees, priests, nuns and religious brothers, guards and supervisors as defined in the Act.

WE WILL, on request, furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

HANNA BOYS CENTER

APPENDIX C

Hanna Boys Center *and* Social Services Union, Local 535, SEIU, AFL-CIO, Petitioner. Case 20-RC-15178

17 July 1987

DECISION ON REVIEW AND
DIRECTION OF ELECTIONS

BY CHAIRMAN DOTSON AND MEMBERS
JOHANSEN AND STEPHENS

On 29 February 1981 the Acting Regional Director for Region 20 of the National Labor Relations Board issued a Decision and Direction of Election in this proceeding, directing separate elections in two voting units of the Employer's employees.[1/] In directing the elections, the Acting Regional Director found, inter alia, that neither the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), nor the religion clauses of the

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1/ The parties stipulated that the following were appropriate:

Unit A: All full-time and regular part-time child-care workers, recreation assistants, cooks, cooks helpers, and maintenance employees including plumbers, electricians, gardeners, and custodians employed by the Employer at its Sonoma, California location: excluding all other employees, professional employees, priest, nuns, and religious brothers, guards and supervisors as defined in the Act;

Unit B: All office clerical employees employed by the Employer at its Sonoma, California location; excluding all other employees, professional employees, confidential employees, priests, nuns, and religious brothers, guards and supervisors as defined in the Act.

first amendment to the U.S. Constitution precluded the Board from asserting jurisdiction in this proceeding because the Employer, in the Acting Regional Director's view, was not a "church operated" school.

On 4 March 1981 the Employer filed a request for review of the Acting Regional Director's Decision and Direction of Election. In its request for review, the Employer contended that the Acting Regional Director's application of "church operated" was too narrow as the Court in *Catholic Bishop* intended to preclude the Board from asserting jurisdiction over schools with a religious mission. On 12 March 1981, the Petitioner filed an opposition to the request, contending the Employer is not church operated and exists for general charitable purposes. On 24 March 1981 we granted the request for review in order to consider in greater detail the jurisdictional arguments.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having considered the entire record in this proceeding, including the parties' briefs, and in light of the Board's recent decision in *Jewish Day School of Greater Washington*, 283 NLRB 756 (1987), we agree with the Acting Regional Director's result but not his rationale and find that the Board has jurisdiction in this proceeding, that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 2(6) and (7) and 9(c)(1) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction here.

Hanna Boys Center is a nonprofit, charitable institution founded in 1945 by two Roman Catholic priests. As described by the Center's current executive director, Reverend James Pulskamp, the two priests, primarily as a consequence of their work in Catholic charities in the archdiocese, perceived the need for a residential facility for boys whose home environments were considered incompatible with their educational needs. The Center originally was located in Menlo Park, California, on property owned by the Archdiocese of San Francisco. One year later the Center incorporated, on a nonprofit basis, under the name Hanna Center for Boys. Its original articles of incorporation indicate that the Center's purpose was "to provide homes and mental, moral, educational, physical, and spiritual training for minor boys who, because of broken homes, or for any other cause, are in danger of becoming delinquents."

In 1950 the Center moved to its present location, Sonoma, California. The property was purchased by the archdiocese through assessments of the parishes within its jurisdiction. In 1962, the archdiocese was divided into three dioceses with the Center falling within the ecclesiastical jurisdiction of the newly created Diocese of Santa Rosa. In the same year, the articles of incorporation were amended to provide that in the event of corporate liquidation, dissolution, or abandonment, corporate property would be distributed to the Bishop of the Diocese of Santa Rosa. In 1973 this provision was amended again, to provide that on dissolution or winding up of the corporation, its assets would be distributed "to an organization organized and operated

exclusively for religious and/or charitable purposes which has established its tax-exempt status under Section 501(2)(3) of the Internal Revenue Code. . . ." The 1973 amendment further provided that the assets would be disposed of "in such manner as may be directed by a decree of the Superior Court . . . upon petition therefor by the Attorney General of the State of California." The amendment also restated the Center's purpose as follows:

> To provide for the protection, care and education of homeless or neglected children; to provide homes for them; to provide, alone or in conjunction with other organizations, for their mental, moral, physical and spiritual training during their minority and thereafter; and to assist, financially and otherwise, other nonprofit tax exempt organizations engaged in similar or related activities.

The Employer's current bylaws vest overall control of the Center in a board of directors, membership of which is limited to a maximum of 45 males. There is an executive committee of the Board which possesses all the powers and authority of the Board with respect to the Center's management and affairs. The bylaws mandate that the President and Senior Vice President shall be, respectively, the Bishop and Vicar General of the Diocese of Santa Rosa but further provide that neither shall be a voting member of either the Board or any standing committee. The President/Bishop of Santa Rosa appoints the executive director and associate

executive director, subject to the approval of the board of directors. Of the members of the board, only the president, senior vice president, executive director and associate executive director are clergy and, as indicated, only the latter two are voting members.

The bylaws further provide that the executive director shall serve as chief executive officer of the Center, responsible for the general direction and control of its affairs, subject to the direction of the Board and/or Executive Committee. The current executive director, Reverend Pulskamp, has served in that capacity since 1972. As provided in the bylaws, he was appointed to the position by the Bishop of the Diocese of Santa Rosa. However, there is no requirement in the bylaws, and the record does not disclose as a requirement, that the executive director be a priest. Reverend Pulskamp testified that the executive director is required to possess a master's degree in social work and that, as far as he knew, simply being a priest was insufficient qualification to hold the position.

There is no requirement that the department heads or any other employees of the Center by Roman Catholic or any other religious denomination and none is appointed or subject to removal by the President/Bishop of Santa Rosa. Reverend Pulskamp testified that the Center's personnel rules and policies, including wage rates and various conditions of employment, are established by the personnel committee, subject to the approval of the Executive Committee and that they are not subject to approval or veto by the bishop of the

diocese.

The Center is licensed by the State of California as a group home for boys. The Center furnishes an affidavit to the Sonoma County Supervisor which gives the Center "official permission to operate as a private school." The Center appears in the State's central listing of California private schools. It is also listed in the Kennedy Directory, an official Catholic church listing in the Kennedy Directory, an official Catholic church listing of all institutions affiliated with it. The Center also has an exemption from Federal income taxes as the Internal Revenue Service considers the Center to be under the supervision of the diocese.

Enrollment in the Center's program is limited to young men between the ages of 9 and 15. There is no requirement that they be Roman Catholic or any other religious denomination, nor that they be residents of the geographic area encompassed by the Diocese of Santa Rosa. At the time of the hearing there were 64 boys at the Center, all admitted through private, voluntary enrollments in which not only the parents or guardian but the would-be entrant also must concur. The Center is eligible to receive public placements, although none has occurred in the recent past. Tuition is paid by parents or guardians on an ability-to-pay basis. Reverend Pulskamp testified that he did not know how many of the current enrollees had tuition paid on their behalf, but that there was no tuition paid in the case of some and the highest tuition currently paid was $300 per month for one enrollee. The Center also receives some Federal funding

under Title I, but by far the main source of funding is the result of the semiannual mail solicitations of the public-at-large. At the hearing, the parties stipulated that, in the Center's fiscal year ending 30 June 1980, it received gross revenues in the form of contributions in excess of $1 million.[2/]

Reverend Pulskamp testified that the basic enrollment criteria are the age of the young man, his willingness to enroll, and whether the Center has a program for him. Initially, the committee reviews various material furnished by the parents or guardians in an effort to determine whither the Center has a program to fill the needs of the family. A free placement at the Center is set up, at which time interviews with the parents and young man are held and standardized psychological tests are given. The committee reviews the findings it has made based on the information, interviews, and tests, and the young man, if admitted, is assigned a caseworker/therapist by Reverend Pulskamp. The therapist is responsible, subject to Reverend Pulskamp's direction and supervision, for drawing up an individual treatment program. In determining the proper program for the young man, Reverend Pulskamp testified that he applies standard social

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2/ The precise stipulation is: "Hanna Boys Center, a California nonprofit, charitable corporation, doing business in Sonoma, California, received, during the past fiscal year, ending 30 June 1980, gross revenues in the form of contributions in excess of one million dollars; which contributions were available for operating expenses. During the same period, the Employer received revenues in excess of two thousand dollars from points directly outside the State of California."

work and psychological techniques. There is no diocesan control over, or input concerning, the particular program formulated. The input provided by Reverend Pulskamp and the school psychologist derives not from their relationship with the diocese but rather from their specialized training as a social worker and psychologist. The young man's school records are evaluated and, based on that evaluation, the young man is placed in the class which "can best accommodate his educational needs for the impairment that he has suffered in his educational program." The Center's principal, Mr. McInnis, further testified that the function of the educational program "is to contribute to the therapy that's being provided," therapy which, Reverend Pulskamp elaborated, encompasses not only educational problems but emotional, psychological, social, and recreational problems as well.

The young men reside at the Center year round, with the exception of brief holiday periods and occasional visits to their homes. Reverend Pulskamp described a typical weekday at the Center as one in which the young men, who reside in cottages, awake around 6:30 a.m. and, after some brief housekeeping chores, are led in groups by child-care workers to the Center's chapel for morning prayers, and then to breakfast. From 9 a.m. to 3 p.m., they attend classes. Classroom instruction may be interrupted for required therapy sessions, the timing of which is set by the caseworker/therapist. Each young man is required to attend at least one therapy session a week. About 50 percent of the parents also attend therapy sessions about once or twice a

month depending on how far they have to travel to the Center or other convenience considerations. There are prayers at the beginning and end of class, as well as grace before and after all meals. After classes, the young men return to the cottages, change clothes, and have time for recreation or homework prior to dinner at 5:30 p.m. After dinner, there are physical education classes for some young men; those apparently not scheduled for such classes simply stay in the cottage area. There are fixed study and shower periods, with evening prayers just before lights out at 10 p.m.

Classroom instruction ranges from grades 5 through 10, and typically consists of seven periods, six covering standard subjects such as mathematics, history, spelling, etc., with the seventh a mandatory, 45-minute "moral guidance" class, taught by three of the five nuns on the Center's faculty. In describing the "basic thrust" of the class, Reverend Pulskamp testified that it was principally devoted to "salvation history," using the Old and New Testaments as sources, and Catholic tradition and teachings on various aspects of theology. He testified that the young men

> would also get exposed to basic tenets of other religions, and along with that . . . certain values that are being conveyed -- again, not only in their religion class, but in other classes too, there are values that are being conveyed, which, hopefully, the child absorbs, makes his own.

Subsequently, in response to a question whether the course

could be said to be the teaching of ethical norms, Reverend Pulskamp responded that that was part of it but not the main thrust: "Ethical norms are taught but also just what we would call basic beliefs are taught also." When asked whether those beliefs encompassed those of religions other than Catholicism, he replied: "That is brought in, I believe, in one course. The principal [McInnis] is probably better equipped to deal with those questions than myself." When asked whether a catechism was part of the class, Reverend Pulskamp indicated that he doubted very much that it was "but, again, that's a question that should be directed to our principal." Mr. McInnis thereafter testified that the reason the class was called "moral guidance" was "so that the principles are given on a general basis of the boys learning right and wrong and moral responsibility." In addition to the moral guidance class and the morning and evening prayer sessions, all entrants are required to attend Mass on Sundays and holy days. The Center also provides voluntary liturgical functions such as a daily Mass, sacraments, and rosary devotions.

Finally, entrants are required to attend classroom instruction year round. Summer classes, however, are given on a curtailed basis and there is no moral guidance class given. Entrants receive regular report cards and, on completing the eighth grade, are given a diploma. On completing the tenth, the Center provides an unofficial certificate of completion and will certify a transcript if the entrant seeks transfer to a high school.

The Employer contends that the Board is precluded from exercising its jurisdiction by the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Petitioner contends that *Catholic Bishop* is not controlling. For the reasons set forth below, we agree with Petitioner.

In the recent decision in *Jewish Day School*, supra, the Board declined to exercise jurisdiction over a unit of teachers in a school because the majority concluded that "*Catholic Bishop* precludes the Board from exercising jurisdiction where a union seeks to represent a unit of *teachers* in a school whose purpose and function in substantial part are to propagate a religious faith." (Footnotes omitted, emphasis added.)

Based on the Board's reading of *Catholic Bishop*, a threshold issue concerning the Supreme Court was the First Amendment issue of freedom of religion and the potential impact of the Board's processes on the relationship between school and teacher. As noted in *Catholic Bishop*, teachers have a "critical and unique role" in fulfilling the mission of a church-operated school and it is that unique role that must be examined to determine whether jurisdiction may be asserted. In the present case, the two voting units encompass clerical employees, recreation assistants, cooks, their helpers, and child-care workers. With the exception of child-care workers, the record is silent with respect to how these employees are in any way connected to the possible religious mission of the Center. There are no teachers in the units

sought. The Employer contends that child-care workers are analogous to teachers but we find that argument to be unpersuasive. Child-care workers "shepherd" the boys from their cottages to chapel, supervise the boys in their cottages, and make sure the boys do their housekeeping chores and homework (which may include work from the moral guidance course), see that the boys say their prayers, and select a boy to say the evening prayer. The child-care worker job description lists eight basic responsibilities as well as qualifications for the job. The only reference to the child-care worker's involvement in religious activities is in 1(D) of the listing of responsibilities and states the child-care worker helps the child in his efforts to meet social expectations such as cleanliness, eating habits, manners, routines, rules, and procedures. This includes "D. Teaching values: ethical principles, religious observances." The qualifications section contains no reference to religion.

There is no indication in the record that the child-care workers are required to, or do in fact, involve themselves in the religious or secular teaching of the entrants. The child-care workers function as someone akin to a "dormitory monitor," an authority figure to supervise the entrants when they are not in class. The child-care workers are clearly less involved in the religious inculcation of the entrants than the teachers are. The sensitive first amendment issues surrounding the assertion of jurisdiction over teachers noted by the Court in *Catholic Bishop* are not involved in the assertion of jurisdiction over the child-care workers and other unit

members in the present case.[3/] Accordingly, we issue the following Direction of Elections.

[Direction of Elections omitted from publication.]

CHAIRMAN DOTSON, dissenting.

I would decline to assert jurisdiction over the Respondent, a nonprofit, charitable corporation which provides shelter and "mental, moral, educational, physical, and spiritual training for minor boys who, because of broken homes, or for any other cause, are in danger of becoming delinquents." As I have stated previously, I would return to the policy of *Ming Quong Children's Center*, 210 NLRB 899 (1974), and decline to assert jurisdiction over nonprofit, charitable institutions unless it has been demonstrated that such institutions have a substantial impact on interstate commerce. See my dissenting opinions in *Salvation Army of Massachusetts*, 271 NLRB 195 (1984), and *Alan Short Center*, 267 NLRB 866 (1983). As no such showing has been made here, I would not exercise jurisdiction over the Respondent. In light of this position, I do not pass on my colleagues' finding that the Supreme Court's decision in

---

3/ In view of our determination that the voting units do not encompass teachers and that jurisdiction may properly be asserted, we find it unnecessary to determine whether Hanna Boys Center is a "school" and whether its "purpose and function in substantial part are to propagate a religious faith." (*Jewish Day School*, supra).

Member Johansen, who dissented from the Board's failure to assert jurisdiction in *Jewish Day School*, joins here in asserting jurisdiction over this Employer.

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), is inapplicable to the present case.

APPENDIX D

NOT INCLUDED
IN BOUND VOLUMES

DJS
Sonoma, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HANNA BOYS CENTER

Employer

and

Case 20-RC-15178

SOCIAL SERVICES UNION,
LOCAL 535, SEIU, AFL-CIO

Petitioner

ORDER DENYING MOTION AND CORRECTION

On 17 July 1987 the National Labor Relations Board issued a Decision on Review and Direction of Elections in this proceeding.[1/]

On 29 July 1987 the Employer filed with the Board

1/ 284 NLRB No. 121.

a Motion for Reconsideration,[2] Request for Full Board Disposition of Issues Under Reconsideration, Motion to Reopen Record for Admission of Additional Evidence, and Motion to Stay Direction of Election Pending Determination of this Matter.[3] The Petitioner filed an opposition to the Employer's motions.

The Board having duly considered the matter,

IT IS ORDERED that the Employer's Motion for Reconsideration, Request for Full Board Disposition[4] of Issues Under Reconsideration, Motion to Reopen Record for Admission of Additional Evidence, and Motion to Stay Direction of Election Pending Determination of this Matter are denied as lacking in merit.

2/ The Petitioner filed a telegram 23 July 1987 requesting that the Board issue an amendment to its Decision on Review and Direction of Elections and that the impounded ballots from the 18 March 1981 election be opened and counted. The Employer filed a telegram in opposition on 24 July 1987 and advised the Board that it would be filing a Motion for Reconsideration.

3/ The Employer also filed a Supplementary Declaration of Father John S. Crews in support of its motions. The Petitioner filed a Motion to Strike the Supplementary Declaration and the Employer filed an opposition to the Motion to Strike. The Motion to Strike is granted.

The Petitioner requested that the Regional Director refer George Tichy, counsel for Employer, to the Department of Justice for suborning a perjured statement. The request was referred to the Board by the Regional Director. After due consideration, the Board has decided not to refer the matter to the Department of Justice. Member Johansen would refer it.

The Employer also filed Proof of Service of 77 NLRB 349.

4/ See *Enterprise Industrial Piping Co.*, 118 NLRB 1 (1957).

IT IS FURTHER ORDERED that the Decision on Review And Direction Of Elections be corrected as follows:

1. Amend the title to read "Decision on Review And Direction."

2. Delete the last sentence before "Direction of Elections" which begins "Accordingly . . ." and substitute the following: "An election was held 18 March 1981 and the ballots were impounded. As a result of our decision to assert jurisdiction, we issue the following Direction."

3. Delete the Direction of Elections and insert instead:

DIRECTION

IT IS DIRECTED that the Regional Director for Region 20 shall, within 10 days from the date of this Decision, open and count the impounded ballots from the election held 18 March 1981 and serve on the parties a tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

IT IS FURTHER ORDERED that the Decision On Review And Direction, as printed, shall appear as corrected.

Dated, Washington, D.C., 16 November 1987.

Wilford W. Johansen, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN DOTSON, dissenting:

For the reasons stated in my prior dissent in this case, I would grant the Employer's Motion for Reconsideration.

Dated, Washington, D.C., 16 November 1987.

Donald L. Dotson, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX E

NOT INCLUDED IN BOUND VOLUMES

SJC
Sonoma, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HANNA BOYS CENTER

Employer

and

Case 20-RC-15178

SOCIAL SERVICES UNION,
LOCAL 535, SEIU, AFL-CIO

Petitioner

ORDER DENYING MOTION

On July 17, 1987[1/] the National Labor Relations Board issued a Decision on Review and Direction of Elections in this proceeding.[2/]

1/ All dates are 1987 unless otherwise indicated.

2/ 284 NLRB No. 121.

On July 29 the Employer filed with the Board a Motion for Reconsideration, Request for Full Board Disposition of Issues under Reconsideration, Motion to Reopen Record for Admission of Additional Evidence, and Motion to Stay Direction of Election Pending Determination of this Matter.

On November 16 the Board issued an Order Denying Motion and Correction wherein it denied the Employer's Motion for Reconsideration and directed the Regional Director to open and count the ballots from the election held March 18, 1981 and thereafter issue the appropriate certification.

On December 2, at the Employer's request, the United States District Court for the Northern District of California issued an Order Staying Enforcement of the Board's July 17 and November 16 decisions.

On December 10 the Employer filed with the Board a Motion for Reconsideration, Motion to Reopen Record for Admission of Additional Evidence, Motion to Stay Counting of Ballots Pending Determination of this Matter and Motion for Full Board Disposition. The Petitioner filed an Opposition to the Employer's Motions.

On February 22, 1988 the United States Court of Appeals for the Ninth Circuit issued an order granting the Board's Motion for Summary Reversal and vacating the District Court's December 2 stay order.

The Board having duly considered the matter,

IT IS ORDERED that the Employer's Motion for Reconsideration, Motion to Reopen Record for Admission of Additional Evidence, Motion to Stay Counting of Ballots Pending Determination of this Matter, and Motion for Full Board Disposition are denied as lacking in merit.

Dated, Washington, D.C., 26 February 1988.

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HANNA BOYS CENTER

Employer

and Case 20-RC-15178

SOCIAL SERVICES UNION,
LOCAL 535, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

Petitioner

ORDER

Employer's Request for Review of the Regional Director's Supplemental Decision is denied as it raises no substantial issues warranting review. In denying review, we note that even assuming, arguendo, we were to consider the "new" evidence now proffered by the Employer in support of its objections, such evidence would not alter our prior

conclusion that the Board is not precluded from asserting jurisdiction over the Employer.

JAMES M. STEPHENS, CHAIRMAN

WILFORD W. JOHANSEN, MEMBER

MARY MILLER CRACRAFT, MEMBER

Dated, Washington, D.C., June 14, 1988.

APPENDIX G

The definition of "employer" and "employee" in the National Labor Relations Act, 29 U.S.C. § 152(1) and (2), are as follows:

> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any

individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

No. 91-1388

In the Supreme Court of the United States

OCTOBER TERM, 1991

HANNA BOYS CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may assert jurisdiction over a religiously affiliated residential facility for troubled boys and require it to bargain with the union certified by the Board as the representative of its child-care workers, recreation assistants, cooks, cooks' helpers, and maintenance employees.

2. Whether the Board reasonably exercised its discretion in ordering petitioner to bargain with the union despite the passage of time and employee turnover that occurred while petitioner was challenging its obligation to bargain.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1388

HANNA BOYS CENTER, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A1-A28) is reported at 940 F.2d 1295. The decision and order of the National Labor Relations Board (Board) in the unfair labor practice proceeding (Pet. App. B1-B10) is reported at 293 N.L.R.B. 359. The Board's decision in the underlying representation proceeding (Pet. App. C1-C14) is reported at 284 N.L.R.B. 1080.

JURISDICTION

The opinion of the court of appeals was filed on August 7, 1991. On October 30, 1991, the court filed an amended opinion and denied the petition for re-

hearing. On January 11, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 27, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Hanna Boys Center (Center) is a non-profit, charitable corporation that operates a residential facility for troubled boys between the ages of nine and fifteen in Sonoma, California. Pet. App. C3, C6. The Center's stated purpose is "[t]o provide for the protection, care and education of homeless or neglected children; to provide homes for them; [and] to provide * * * for their mental, moral, physical and spiritual training during their minority." *Id.* at C4. The Center is licensed by the State of California as a group home for boys and is permitted by the County of Sonoma to operate as a private school. *Id.* at C6.

The Center was founded by two Roman Catholic priests and is located on property owned by the Diocese of Santa Rosa. Pet. App. C3. Its overall control is vested in a board of directors, only two of whose voting members are clergy.[1] The executive director, who is responsible for the general direction and control of the Center, is appointed by the Bishop of the Diocese of Santa Rosa, subject to the approval of the board of directors. The executive director must possess a master's degree in social work and has always been, but is not required to be, a priest. There is no requirement that Center residents or employees

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[1] The Bishop and the Vicar General of the Diocese of Santa Rosa are *ex officio*, non-voting members of the Board. Pet. App. C4.

be members of the Catholic or any other faith. *Id.* at C4-C5.

Approximately 64 young men live in cottages located on the Center's grounds year-round, with the exception of brief holiday periods and occasional visits to their homes. Pet. App. C6, C8. On a typical weekday, the residents arise at about 6:30 a.m., perform housekeeping chores, and are then led in groups to the Center's chapel for morning prayers, followed by breakfast. *Id.* at C8. From 9:00 a.m. to 3:00 p.m., the residents attend classes, with breaks for lunch, recess, and mandatory therapy sessions, which are administered by professional social workers and psychologists. *Id.* at C7-C9. Residents attend classes in standard academic subjects, and are required to take a "moral guidance" class taught by nuns, who instruct the residents in basic religious beliefs and ethical norms. *Id.* at C9-C10.

After classes, the residents return to their cottages and engage in recreation or work until 5:30 p.m., when dinner is served. After dinner, some residents take physical education classes and others remain in the cottage area. There are study and shower periods, followed by evening prayers and bedtime at 10:00 p.m. Pet. App. C9. In addition to the morning and evening prayers, the residents participate in mandatory prayers at the beginning and end of the six-hour classroom instruction period and say grace before and after each meal. *Ibid.* Each resident is required to attend mass on Sundays and holy days, and the Center provides the opportunity for residents to participate in voluntary religious activities such as daily mass, sacraments, and rosary devotions. *Id.* at C10.

The Center's staff includes approximately 16 or 17 child-care workers who live with the residents in the

Center's four cottages. Pet. App. C12; Tr. 77-78, 120. The "[c]hild-care workers 'shepherd' the boys from their cottages to chapel, supervise the boys in their cottages, and make sure the boys do their housekeeping chores and homework (which may include work from the moral guidance course), see that the boys say their prayers, and select a boy to say the evening prayer." *Id.* at C12. The Center's qualifications for child-care workers do not refer to religion. *Ibid.*

2. In September 1980, the Social Services Union Local 535, Service Employees International Union (Union) filed a petition with the Board for a representation election in units consisting of all full-time and regular part-time child-care workers, recreation assistants, cooks, cooks' helpers, and maintenance employees (Unit A), and office clerical employees (Unit B). All professional workers, priests, nuns, and religious brothers were excluded from both units. The Center stipulated to the appropriateness of these units. Pet. App. A4, C1 n.1. It contended, however, that the Center is a church-operated school and, therefore, that the Board's assertion of jurisdiction is impermissible under the National Labor Relations Act (Act) as construed in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Center also objected to the Board's assertion of jurisdiction on First Amendment grounds. Pet. App. C1-C2.

Following a hearing, the Board's Acting Regional Director (ARD) determined that the Board's assertion of jurisdiction was proper because, although the Center is a school, it is not "church operated." Pet. App. C2. In March 1981, the Board granted the Center's request for review in order to give further consideration to the issue of jurisdiction under the Act. The representation election also took place in

March 1981 and the ballots were impounded pending the Board's resolution of the jurisdictional issue. *Id.* at A4-A5.

On July 17, 1987, the Board, relying on its recently issued decision in *Jewish Day School of Greater Washington, Inc.*, 283 N.L.R.B. 757 (1987), affirmed the ARD's assertion of jurisdiction over the Center. Pet. App. C1-C13.[2] The Board stated that "*Catholic Bishop* precludes the Board from exercising jurisdiction where a union seeks to represent a unit of *teachers* in a school whose purpose and function in substantial part are to propagate a religious faith." *Id.* at C11, quoting *Jewish Day School*, 283 N.L.R.B. at 761 (emphasis by the Board).[3] In this case, the Board found it unnecessary to decide whether the Center is a "school" and whether its "purpose and function in substantial part are to propagate a religious faith," *id.* at C13, n.3, because the Board determined that there were no teachers in the units sought to be represented by the Union. *Id.* at C11-C12. The absence of teachers was important because, as the Board had

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[2] Chairman Dotson dissented, indicating that he would, as a matter of policy, decline to assert jurisdiction over nonprofit, charitable institutions unless such institutions have a substantial impact on interstate commerce, which he found lacking here. Pet. App. C13-C14.

[3] Previously, the Board had taken the view that *Catholic Bishop* was limited to teachers in "church-operated" schools. *Bishop Ford Central Catholic High School*, 243 N.L.R.B. 49 (1979), enforcement denied, 623 F.2d 818 (2d Cir. 1980), cert. denied, 450 U.S. 996 (1981). *Jewish Day School* overruled that holding, explaining that *Catholic Bishop* emphasized the unique and vital relationship between student and teacher in carrying out the goals of schools with a religious mission, whether or not the school is church-operated. 283 N.L.R.B. at 760-761.

explained in *Jewish Day School*, "the source of the significant risk of constitutional infringement" that was present in *Catholic Bishop* "is the potential impact of the Board's processes on the relationship between school and teacher." 283 N.L.R.B. at 761.

In this case, the Board explained that "[w]ith the exception of child-care workers, the record is silent with respect to how these employees [recreation assistants, cooks, their helpers, and maintenance employees] are in any way connected to the possible religious mission of the Center." Pet. App. C11. The Board also rejected petitioner's claim that the "child-care workers are analogous to teachers." *Id.* at C12. The Board found that the child-care workers generally function as "someone akin to a 'dormitory monitor,' an authority figure to supervise the entrants when they are not in class." The Board added that "[t]here is no indication in the record that the child-care workers are required to, or do in fact, involve themselves in the religious or secular teaching of the entrants." *Ibid.*

The Board directed the Regional Director to count the impounded ballots. Pet. App. D.3.[4] Only the employees in Unit A voted in favor of the Union. In April 1988, the Regional Director certified the Union as the collective bargaining representative of

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[4] The Board denied petitioner's motion for reconsideration and to reopen the record for admission of new evidence as "lacking in merit." Pet. App. D2 & n.3; see also *id.* at E3. Petitioner then obtained a stay of the Board's order in federal district court. A motions panel of the Ninth Circuit summarily reversed and vacated the stay. The district court then dismissed petitioner's complaint. The Ninth Circuit affirmed the dismissal, holding that the motion panel's order had implicitly determined that the district court lacked subject-matter jurisdiction and that its ruling was the law of the case. See *Hanna Boys Center* v. *Miller*, 853 F.2d 682 (9th Cir. 1988).

the employees in Unit A. *Id.* at B5. The Board denied petitioner's request for review of the Regional Director's decision and its renewed request to reopen the record for consideration of "new" evidence, finding that the proffered evidence "would not alter [the Board's] prior conclusion" as to jurisdiction. *Id.* at F1-F2.

Petitioner refused to bargain. On the Union's unfair labor practice charge, the Board's General Counsel issued a complaint. Finding that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding, the Board granted summary judgment decreeing that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). The Board ordered petitioner to bargain with the Union and to provide it with requested information. Pet. App. B1-B8.[5]

3. The court of appeals enforced the Board's order. Pet. App. A28. Preliminarily, the court rejected petitioner's contention that enforcement of the Board's order should be denied because of administrative delay, *id.* at A8-A9, or because the Board refused to reopen the record to consider evidence of changes in the Center's structure, mission, and employees' duties occurring after 1981, when the election was held. *Id.* at A9-A11. The court explained that the

---

[5] The Board rejected petitioner's contention that "new evidence submitted during the investigation of this unfair labor practice charge requires a new hearing." Pet. App. B3 n.5. The Board found that petitioner had "not shown that such evidence is newly discovered or previously unavailable," *ibid.*, as required by Section 102.48(d)(1) of the Board's Rules and Regulations, 29 C.F.R. 102.48(d)(1). The Board also found that the proffered evidence would not require a different result on the jurisdictional issue. Pet. App. B3 n.5.

"passage of time for the orderly adjudication of labor disputes cannot be used as a basis for denying an enforcement order." *Id.* at A10.

On the merits, the court rejected petitioner's claim that *Catholic Bishop* bars all assertion of jurisdiction by the Board over church-operated schools. Pet. App. A14-A16. The court pointed out that "[t]he facts of *Catholic Bishop* are confined to Board jurisdiction over teachers." *Id.* at A14. The court noted that the "constitutional question that the Court sought to avoid was that which would flow 'from the Board's exercise of jurisdiction over teachers in church-operated schools.' " *Id.* at A14-A15, quoting *Catholic Bishop*, 440 U.S. at 504. The court thus concluded that *Catholic Bishop* "was clearly founded on the 'unique role' of teachers in accomplishing the religious goals of the school." Pet. App. A15.

Applying that test, the court upheld the Board's finding that none of the bargaining-unit employees "are to any significant degree 'teachers' whose role is particularly involved with the accomplishment of the religious goals of [petitioner]." Pet. App. A17. The court observed:

> For all that appears, cooks primarily prepare food. Comparable conclusions can easily be drawn from the record regarding the other employees of the bargaining unit, with the possible exception of the child-care workers. Even there, however, the record supports the [B]oard's finding that the role of the child-care workers was not significantly involved with religion.

Id. at A17-A18. The court added that, while the job description of the child-care workers included a "teaching function," there was "no evidence that the actual duties of the child-care workers included any

teaching." *Id.* at A19. Accordingly, the court rejected petitioner's attempt to portray the employees in Unit A as being "intimately involved with the students as spiritual and theological mentors." *Ibid.*

Having determined that *Catholic Bishop* did not foreclose the Board's exercise of jurisdiction, the court of appeals addressed whether that exercise would violate the Religion Clauses of the First Amendment. Pet. App. A19-A20. In considering the Establishment Clause, the court applied the three-part test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). As to the first two prongs of *Lemon*, the court observed that the record indicated that application of the Act to petitioner's non-teaching employees has a "secular purpose" and has "a primary effect that neither advances nor inhibits religion." Pet. App. A20-A21. Turning to the "entanglement" prong, the court concluded that in light of the fact that Board jurisdiction would be limited to overseeing labor-relations matters of secular employees who are not involved in furthering petitioner's religious mission, *id.* at A22-A23, "Board jurisdiction over [the unit] employees should involve the Board minimally, if at all, in [petitioner's] religious mission." *Id.* at A23.

The court also rejected petitioner's claim under the Free Exercise Clause. Applying the balancing test established in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the court found that "Board jurisdiction here will not interfere with the free exercise of *religious beliefs* of anyone at [petitioner]."[6] Pet. App. A27.

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[6] The court noted that after the parties had filed their briefs, this Court had limited the application of the Free Exercise Clause against certain generally applicable laws in *Employment Div., Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990). Pet. App. A25. While expressing doubt as

The court explained that petitioner's free exercise rights are "scarcely implicated" because the "pervasively secular nature of the [unit] employees' duties ensures that Board involvement in labor disputes will be confined to the secular aspects of [petitioner's] operations." *Ibid.* That "minimal showing of any impact on religious belief or practice," the court concluded, does not outweigh the government's compelling interest in resolving labor disputes through the processes of negotiation. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-22) that the court of appeals' decision conflicts with *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). According to petitioner, that decision precludes Board jurisdiction over all employees of church-operated schools. The court of appeals, however, correctly interpreted *Catholic Bishop* not to apply to the non-teaching secular employees of such institutions as are involved in this case, and its decision does not conflict with the decision of any other court of appeals. Review of petitioner's claim is therefore unwarranted.

a. In *Catholic Bishop*, this Court found that the Board's assertion of jurisdiction over teachers in Roman Catholic parochial schools posed a significant risk of "entanglement with the religious mission of the school." 440 U.S. at 502. Applying its prudential practice of construing an Act of Congress to avoid a serious constitutional question if possible, the Court looked to see whether there was a "clear expression

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to the applicability of *Smith* to the facts of this case, the court concluded that it need not resolve that question, because petitioner's "free exercise claims do not survive even the less restrictive *Sherbert* balancing test." Pet. App. A25-A26.

of an affirmative intention of Congress that teachers in church-operated schools should be covered by the [National Labor Relations] Act." *Id.* at 504. Finding no such clearly expressed intention, the Court ruled that teachers in such institutions are not covered by the Act. *Id.* at 507.

Petitioner contends (Pet. 14) that, "although *Catholic Bishop* discusses the role of teachers, the Court's final decision rests upon its finding that Congress did not grant the Board jurisdiction over a certain type of employer, a church-operated school." That expansive reading of *Catholic Bishop* is incorrect. The issue on which the Court granted review in *Catholic Bishop* was "[w]hether *teachers* in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act." 440 U.S. at 491 (emphasis added). The Court acknowledged that "Congress defined the Board's jurisdiction in very broad terms," [7] but it required a heightened showing of congressional intent, beyond the language of the statute itself, because of the Court's perception that "the Board's exercise of jurisdiction over teachers in church-operated schools" would raise "serious First Amendment questions." *Id.* at 504. The Court's holding, which dealt only with teachers, plainly does not constitute a jurisdictional ruling as to any and all employees of a church-operated educational institution.[8]

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[7] Section 2 of the Act defines the term "employer" to include "*any* person acting as an agent of an employer, directly or indirectly," subject to eight identified exceptions (none of which applies to petitioner). 29 U.S.C. 152(2) (emphasis added).

[8] The Court noted that the bargaining units in *Catholic Bishop* were comprised only of teachers and did not include

Moreover, as the court of appeals correctly observed, Pet. App. A14-A16, the constitutional concerns that underpinned *Catholic Bishop*'s statutory holding flowed from the Board's claim of jurisdiction over teachers in particular, not simply any employees of a church-operated school. The Court emphasized that its cases addressing aid to parochial schools had "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." 440 U.S. at 501. The Court added that it is the "key role played by teachers" in such religious enterprises that gives rise to particular risks of entanglement of the secular and religious. *Ibid.* And the Court's analysis of the serious constitutional question presented in that case had to do specifically with "the Board's exercise of jurisdiction over teachers in church-operated schools." *Id.* at 504.[9]

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office clerical employees, maintenance employees, cafeteria workers, or watchmen. 440 U.S. at 493 n.5.

[9] Petitioner relies (Pet. 14) on *Catholic Bishop*'s statements that the Court's "examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools," 440 U.S. at 504, and that "[a] close examination of [the legislative history of the 1974 amendments to the Act] * * * reveals nothing to indicate an affirmative intention that such schools be within the Board's jurisdiction." *Id.* at 505. Those statements do not suggest that the Board lacks jurisdiction over such institutions for all purposes. The quoted statements were made in the course of the Court's search for a showing of clear congressional intent that was required because of the serious constitutional question raised by Board jurisdiction over *teachers* in church-operated schools. The holding of *Catholic Bishop* that an affirmative intent is required to apply the Act in that setting does not mean that a clearly expressed intent (beyond the statutory language) is required to apply the Act

In contrast, application of the Act to the employees of petitioner involved here—recreation assistants, cooks, cooks' helpers, maintenance employees, and child-care workers—does not trigger a serious constitutional question. See pp. 14-19, *infra*. With respect to these "secular employees who are not significantly involved in teaching," Pet. App. A17, and who have no significant involvement in furthering the religious mission of the school, *id.* at A18, A22, C12, there is no threat of unconstitutional intrusion on religious values. Accordingly, the court of appeals properly distinguished *Catholic Bishop* and declined petitioner's request "to construe the [Act] more narrowly than its plain language invites." *Id.* at A17.

b. There is no merit to petitioner's claim (Pet. 12-13) that the decision in this case conflicts with *Christ the King Regional High School* v. *Culvert*, 815 F.2d 219 (2d Cir.), cert. denied, 484 U.S. 830 (1987). There, a state labor relations board asserted jurisdiction over lay teachers at a religiously affiliated secondary school. The school claimed that the state agency's jurisdiction was preempted by the National Labor Relations Act. Citing *Catholic Bishop*, the Second Circuit rejected that contention, holding that "[s]ince the Supreme Court has held that [the Act] does not cover teachers in church-operated schools, * * * states are not preempted from regulating teachers in these schools." 815 F.2d at 222. The statement in *Christ the King* quoted by petitioner (Pet.

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in all other settings involving religiously oriented schools. Cf. *Peretz* v. *United States*, 111 S. Ct. 2661, 2667 (1991). Normally, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988).

13) that "the [National Labor Relations Board] does not have jurisdiction over church-operated schools," 815 F.2d at 222, is, at most, dictum.[10] Because only teachers were involved in *Christ the King*, the court had no occasion to consider whether the Board would have had jurisdiction over other types of employees, such as the employees involved here. And no holding of the Second Circuit has applied *Catholic Bishop* to a bargaining unit other than teachers.[11]

2. Petitioner contends (Pet. 16-17) that if *Catholic Bishop* allows the Board statutory jurisdiction over the school involved in this case, the exercise of that jurisdiction violates petitioner's First Amendment rights. In petitioner's view (Pet. 17), because "church-operated schools, especially Catholic schools, are permeated with a religious mission, all employees of the schools, not just teachers, are guided by religious goals and are subject to the doctrines and moral teachings of the church." The record in this case suggests otherwise, and, in light of that record, peti-

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[10] Moreover, the statement purported only to summarize the holding of *NLRB* v. *Bishop Ford Central Catholic High School*, 623 F.2d 818 (2d Cir. 1980) (*Catholic Bishop* applies not only to church-owned schools, but also to schools with a religious mission), cert. denied, 450 U.S. 996 (1981). *Bishop Ford*, like *Christ the King*, involved only teachers.

[11] See *Catholic High School Ass'n of Archdiocese* v. *Culvert*, 753 F.2d 1161, 1165 n.2 (2d Cir. 1985) (*Catholic Bishop* "held merely that the [National Labor Relations Board] did not have jurisdiction over lay teachers because there was no clear statement that Congress had intended to cover them"; accordingly, state jurisdiction over teachers was not pre-empted); *NLRB* v. *Bishop Ford Central Catholic High School*, 623 F.2d at 822 ("The entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith.").

tioner's constitutional claims do not merit this Court's review.

a. The Board found that petitioner's cooks, cooks' helpers, recreation assistants, and maintenance workers are not "in any way connected to the possible religious mission of the Center," and that the Center's child-care workers are not required to and do not in fact "involve themselves in the religious or secular teaching of the entrants." Pet. App. C11-C12. The court of appeals, in reviewing the Board's order, found "substantial evidence in the record to support the Board's determination that [petitioner's] religious character and mission * * * [are] furthered by others than the employees of Bargaining Unit A." *Id.* at A22.[12]

The Board and the court of appeals "clearly took account of the religious aspects of [petitioner's] endeavors, and were correct in scrutinizing the activities at issue by reference to objectively ascertainable facts concerning their nature and scope." *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 299 (1985). Their finding that the unit employees are not involved in furthering the religious mission of the Center resolves "a factual question * * * barred from review in this Court 'absent the most

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[12] Although petitioner at times seems to emphasize the duties of the child-care workers, see Pet. 6, 7, 11, 19, petitioner's legal claim draws no distinction between the child-care workers and the rest of Unit A, which includes cooks, plumbers, electricians, gardners, and custodians. Pet. App. C1 n.1. In any event, no such distinction is warranted on the record here. As the court of appeals noted, petitioner stipulated to the appropriateness of the composition of Unit A, thus acknowledging that the child-care workers are "similarly situated for labor relations purposes with cooks and maintenance workers." *Id.* at A19.

exceptional circumstances.'" *Ibid.* In light of that finding, the issue presented by this record is whether the Constitution bars application of the Act to secular employees who are not significantly involved in furthering the school's religious mission. The court of appeals correctly held that it does not.[13]

b. The Establishment Clause is not infringed by applying the Act to the employees at issue here. Petitioner's sole contention is that the Board's assertion of jurisdiction would violate the third prong of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), "in that it would foster excessive state entanglement with

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[13] Other circuits have also rejected constitutional challenges to the Board's assertion of jurisdiction over employees who perform functions essentially similar to those involved here. See *Volunteers of America-Minnesota-Bar None Boys Ranch* v. *NLRB*, 752 F.2d 345, 348-349 (8th Cir.) (child-care, maintenance, laundry, and housekeeping workers at residential treatment facility for children), cert. denied, 472 U.S. 1028 (1985); *Denver Post of the Nat'l Society of the Volunteers of America* v. *NLRB*, 732 F.2d 769, 772-773 (10th Cir. 1984) (counselors in temporary care facilities for children); *Tressler Lutheran Home for Children* v. *NLRB*, 677 F.2d 302, 307 (3d Cir. 1982) (health care professionals, maintenance, housekeeping, and laundry employees in church-affiliated nursing home); *NLRB* v. *St. Louis Christian Home*, 663 F.2d 60, 64-65 (8th Cir. 1981) (maintenance, storeroom, and child-care workers at church-sponsored center for abused children). While those cases noted that the religiously affiliated institutions in question performed essentially secular functions, the Board here, in view of its finding that the employees involved were not teachers, never determined whether petitioner's "purpose and function in substantial part are to propagate a religious faith." Pet. App. C13 n.3. The court of appeals concluded only that Catholicism is "woven thoroughly into the institution" although the Center's "primary purpose and character is secular." *Id.* at A22.

religion." [14] Pet. 17. Petitioner claims that the resolution of unfair labor practices could impermissibly involve the Board in matters of religious doctrine.[15] Petitioner also claims that a bargaining requirement over conditions of employment in itself would inhibit the school's functions. Pet. 17-20.

Application of the Act to the bargaining unit employees, however, does not prevent petitioner from imposing discipline because of religious views. The Board's role would be to assess whether an employee was disciplined for activity protected by the Act, rather than for other reasons. Moreover, because the duties of the unit employees are "overwhelmingly secular, arbitration of grievances arising out of [their] employment should not involve the Board in issues of theology." Pet. App. A23. Finally, the requirement of identifying bargaining subjects for the

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[14] The court of appeals relied on *Lemon* in rejecting petitioner's Establishment Clause claim. Pet. App. A20-A25. The application of *Lemon* in a different context is before this Court in *Lee* v. *Weisman*, No. 90-1014 (argued Nov. 6, 1991). In the setting of *Lee*—governmental acknowledgement of religion in civic life and ceremonies—the United States has argued that the *Lemon* test should be replaced by an inquiry that focuses on whether the acknowledgement threatens the establishment of an official religion or coerces participation in religious activities. Brief for the United States as Amicus Curiae in *Lee* v. *Weisman*, at 6-7. (We have provided a copy of our amicus brief to petitioner.) Given the very different facts here, we do not believe that this case should be held for *Lee*. Whether or not this Court modifies *Lemon*, the Board's regulation of petitioner's labor relations in the present context does not constitute the establishment of religion.

[15] Petitioner posits the case of an employee who is disciplined for refusing to supervise daily prayers or for advocating views that contradict fundamental church teachings. Pet. 19.

employees here would not intrude on petitioner's religious goals for the Center.[16]

c. Petitioner's Free Exercise claim (Pet. 21-22) is also without merit. Petitioner makes no claim that Board jurisdiction over the Center violates petitioner's religious beliefs. "Catholic doctrine has no objection to unionization or collective bargaining" as such. Pet. App. A27. Nor does petitioner state that Board jurisdiction would interfere with petitioner's religious practices. Petitioner's only claim (Pet. 21) is that if it is subject to Board jurisdiction, it "will be required to negotiate terms that would otherwise be determined exclusively by Catholic doctrine."

Petitioner identifies no concrete doctrinal concerns that bargaining might infringe, and it is difficult to see how such conflicts would arise in bargaining regarding terms of employment for employees with "pervasively secular * * * duties." Pet. App. A27. Nor would petitioner be required to accept terms that violate religious teachings. In that setting, free exercise rights are "scarcely implicated." *Ibid.* Even assuming that those rights require a balancing of interests under *Sherbert* v. *Verner*, 374 U.S. 398 (1963), petitioner errs in contending (Pet. 21) that "the Board has no compelling interest in asserting jurisdiction over church-operated schools."[17] As in

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[16] The concerns raised by petitioner are similar to those noted by the Court in *Catholic Bishop*, 440 U.S. at 502-503, but the nature of the employees distinguishes this case from that one. In contrast to teachers at religious schools, whose functions are inherently interwoven with religious matters, the employees here have no significant religious function, making any potential conflict between the Board's jurisdiction and the school's religious mission remote at best.

[17] The court of appeals held that because petitioner's rights would not be infringed under *Sherbert*'s balancing test, it

other employment contexts, the government has a compelling interest in fostering negotiations so as to reduce labor unrest. See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 211 (1964); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

3. a. Petitioner contends (Pet. 22-25) that the court of appeals should have denied enforcement of the Board's bargaining order because of unreasonable delay in adjudicating its jurisdictional challenge. As the court of appeals noted (Pet. App. A8), however, if enforcement of a bargaining order were denied because of lengthy administrative delay, the "effect would only be to continue the deprivation of the right of these employees to union representation, as provided by the NLRA." Accord *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507, 1509-1510 (2d Cir.), cert. denied, 488 U.S. 828 (1988); *NLRB* v. *Parents & Friends of the Specialized Living Center*, 879 F.2d 1442, 1457 (7th Cir. 1989). Nor is petitioner correct in claiming (Pet. 24) that the change in personnel in the bargaining unit during the Board's proceedings warrants a different result. Changes in personnel or a union's loss of majority status during delays due to litigation does not terminate an employer's obligation to bargain, even if the employees subsquently repudiate the union (which is not alleged to be the case here). See *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962); *Franks Bros.* v. *NLRB*, 321 U.S. 702, 703-706 (1944).

Petitioner errs in claiming (Pet. 23-24) that the decision below conflicts with *NLRB* v. *Connecticut*

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was not necessary to consider whether the limitations on free exercise claims announced in *Employment Div., Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990), apply in this context.

Foundry Co., 688 F.2d 871, 881 (2d Cir. 1982), and *NLRB* v. *Nixon Gear, Inc.*, 649 F.2d 906, 912 (2d Cir. 1981). Although those cases denied enforcement, they did not turn solely on delay, but also involved "procedural mistakes" as petitioner acknowledges (Pet. 24). As the Second Circuit later explained in *Star Color Plate*, the disposition of those cases turned on the fact that flaws in the resolution of election objections made the Board's orders unenforceable and required additional proceedings. 843 F.2d at 1509. When that factor is not present, *Star Color Plate* makes clear that the Second Circuit does not deny enforcement solely because of delay. *Ibid.*

Nor is there a conflict with *NLRB* v. *Katz*, 701 F.2d 703, 709 (7th Cir. 1983). There, as in *Connecticut Foundry* and *Nixon Gear*, the court found that contested election objections required an evidentiary hearing before a bargaining order could be enforced, and, in light of the delay, the court declined to order a remand. In a case like this one, however, where the delay is "in large part due to the NLRB's reexamination of the jurisdiction issue," the Seventh Circuit has held that *Katz* is distinguishable and the Board's order should be enforced. *Parents & Friends*, 879 F.2d at 1457-1458. Finally, in *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087 (7th Cir. 1984), the court found that a remand was required for further articulation of the basis of the Board's unit determination before a bargaining order could be enforced. In those circumstances, and because 59 of the 72 unit employees had repudiated the union subsequent to the election, the court stated that it would not enforce a bargaining order should the Board reaffirm its unit determination after remand. *Id.* at 1094-1095. Those circumstances are not present here.

b. Finally, there is no merit to petitioner's contention (Pet. 25-26) that the Board erred in refusing to reopen the record to consider evidence of changes in the Center's corporate status, bylaws, Mission Statement, and duties of bargaining unit employees. The court of appeals found that petitioner was actually asking that the Board be required "to start all over again," Pet. App. A11, and it concluded that "such a procedure is not warranted by the nature of the 'new' facts offered here, and is prohibited by settled rules." Id. at A9.[18]

Petitioner claims (Pet. 25) that, because Board jurisdiction over an employer may be questioned at any time, the Board must reopen the record whenever it is alleged that new facts implicate its jurisdiction. The cases cited by petitioner (Pet. 25-26) do not support that assertion.[19] But in any event, the Board

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[18] The court noted that the Board's rules, 29 C.F.R. 102.48-(d)(1), provide that additional evidence will not be considered unless it "was in existence at the time of the proceeding before the Board, but has become available only since the close of the hearing" and "the moving party also demonstrates 'that the new evidence would require a different result.'" It found that the Board had not abused its discretion in applying that rule here. Pet. App. A10-A11 & n.3.

[19] In *St. Elizabeth Hosp.* v. *NLRB*, 715 F.2d 1193, 1196 (7th Cir. 1983), there was no request to reopen the record; rather, the court rejected the Board's contention that judicial review of the jurisdictional issue had been waived because it was not timely raised before the Board. In *Burns Elec. Sec. Serv. Inc.* v. *NLRB*, 624 F.2d 403, 409-410 (2d Cir. 1980), because the new evidence had been admitted during the unfair labor practice proceeding as pertinent to a separate unfair labor practice charge, the court found error in the Board's refusal to reconsider the validity of the original unit determination. And, in *Museum Assoc.* v. *NLRB*, 688 F.2d 1278, 1281 (9th Cir. 1982), the court enforced a bargaining order despite

did consider petitioner's proffer of additional evidence on the merits and determined that it "would not alter our prior conclusion" as to the propriety of its assertion of jurisdiction. Pet. App. F1-F2; see notes 4-5, *supra*. Petitioner's conclusory allegations are insufficient to show that the "new" evidence it sought to introduce would require a reassessment of the jurisdictional issue by the Board.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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allegations that the facts relevant to jurisdiction had changed while the case was *sub judice*, without prejudice to the employer's applying to the Board for reopening.

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